IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. _____

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees,

and

PAUL V. DURKIN, *et al.*,

Appellees,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

Appellant First Mercantile Consumer Discount Company ("First Mercantile") appeals from so much of the

final judgment of the Supreme Court of New Jersey, entered on March 17, 1970 and reported at 55 N. J. 489, 262 A. 2d 874, as affirms the judgment of the Superior Court of New Jersey, Appellate Division, entered on September 11, 1968 and reported at 102 N. J. Super. 549, 246 A. 2d 460. First Mercantile does not appeal from that part of said judgment of the Supreme Court of New Jersey which modifies the supplemental determination of the Appellate Division, entered on February 24, 1969 and reported at 104 N. J. Super. 512, 250 A. 2d 593.* Specifically, this appeal is taken from the New Jersey Supreme Court's adjudication of the merits of this controversy, and not from that court's ruling on the extent to which its judgment will be retroactively applied. See *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 364 (1932).

This Jurisdictional Statement is submitted, pursuant to *United States Supreme Court Rule* 15, to demonstrate that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The majority opinion of the Supreme Court of New Jersey and the dissenting opinion of Chief Justice Weintraub (in which two other Justices joined) are set forth at Appendix B, *infra*. The initial opinion of the Superior Court of New Jersey, Appellate Division, is set forth at Appendix C, *infra*, and that court's supplemental opinion is set forth at Appendix D, *infra*. The opinion of the Superior Court of New Jersey, Law Division, which was rendered on November 3, 1967 and which is not reported, is set forth at Appendix E, *infra*.

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* Appellant's Notice of Appeal is set forth at Appendix A, attached hereto.

Jurisdiction

Here is what the New Jersey Supreme Court held, by a vote of 4-3: where a Pennsylvania corporation, licensed and regulated by the Pennsylvania Department of Banking under the Pennsylvania Consumer Discount Company Act, 7 *Purdon's Penn. Stat. Ann.* §§6201, *et seq.*, lends money in Pennsylvania, in full compliance with that act, to a New Jersey borrower who has travelled to Pennsylvania to obtain the loan; and where the terms of the loan require that it be repaid in Pennsylvania; and where the only contacts with New Jersey are (a) the borrower resides there and (b) the security is a second mortgage on New Jersey real property; then, the loan is entirely unenforceable in New Jersey's courts—neither principal nor interest may be recovered—unless the lender has been licensed under the New Jersey Secondary Mortgage Loan Act of 1965, N.J.S.A. 17:11A-1, *et seq.*, and the loan fully complies with that act. 55 N. J. at 491, 262 A. 2d at 875, affirming 102 N. J. Super. 549, 246 A. 2d 460.*

The rationale was that the New Jersey Legislature, by "implied legislative fiat" implanted in the Secondary Mortgage Loan Act, extended the ambit of that act to cover loan transactions entered into in other states. 102 N. J. Super. at 562-66, 246 A. 2d at 467-69. This, despite the Appellate Division's admission that "Supervision of [Pennsylvania] licensees [by Pennsylvania authorities] is comprehensive and comparable to that provided for by the New Jersey act." 102 N. J. Super. at 559, 246 A. 2d at 465. As Chief Justice Weintraub wrote in his dissent: "the majority opinion must ultimately amount to this extraordinary proposition, that any loan to a New Jersey resident made anywhere is wholly void if it would

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* The New Jersey statute is set forth at Appendix F, *infra*, and the Pennsylvania statute is set forth at Appendix G, *infra*.

violate our usury statutes if made here, even though the loan was authorized by the law of the place where it was negotiated, made and payable." 55 N. J. at 498, 262 A. 2d at 879.*

Appellant is a Pennsylvania corporation licensed under Pennsylvania's Consumer Discount Company Act. Its place of business is 2009 Chestnut Street, Philadelphia. Millions of dollars in loans it extended to New Jersey residents at its place of business are now subject to forfeiture by reason of the determination below. The existence of its business, the jobs of its employees, are in jeopardy. Other Pennsylvania licensees are similarly situated.

The construction of the New Jersey Secondary Mortgage Loan Act by the Supreme Court of New Jersey, even if erroneous, *cf.* Weintraub, C.J., dissenting at 55 N. J. 498-99, 262 A. 2d 879-80, is binding upon this Court. See, *e.g., Kingsley Corp.* v. *Regents of U. of N. Y.*, 360 U. S. 684, 688 (1959); *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 513 (1933). The legislation, glossed with this construction, was challenged by appellant in the courts below as repugnant to the *United States Constitution*, Article 1, Section 8, Clause 3 (Commerce Clause), Article 4, Section 1 (Full Faith and Credit Clause), and Amendment 14 (Due Process Clause). This challenge was rejected and the act, as construed, was upheld. 55 N. J. 489; 262 A. 2d 874 (decided March 17, 1970). Appellant filed its notice of appeal with the Clerk of the Supreme Court of New Jersey on April 3, 1970, pursuant to *United States Supreme Court Rule* 10(3).

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* The reason is that the security is not central to the transaction. 55 N. J. at 496-98, 262 A. 2d at 878-79; see *Restatement Second, Conflict of Laws*, §195, *Comment b*; *Manhattan Life Ins. Co.* v. *Johnson*, 188 N. Y. 108, 80 N. E. 658 (1907).

It is respectfully submitted that this Court has jurisdiction to review the judgment below by appeal pursuant to 28 *U.S.C.* §1257(2). See, *e.g.*, *Hess* v. *Illinois*, 386 U. S. 753, 754 (1967); *American Oil Co.* v. *Neill*, 380 U. S. 451, 455 (1965).

Questions Presented

1. Is the New Jersey Secondary Mortgage Loan Act, *N.J.S.A.* 17:11A-1, *et seq.*, as construed by the New Jersey Supreme Court, repugnant to the *United States Constitution*, Article I, Section 8, Clause 3 (the Commerce Clause), where said act regulates interstate loan transactions, rendering non-conforming interstate loans wholly unenforceable in the courts of New Jersey?

2. Is said act, as construed, repugnant to the Commerce Clause of the *United States Constitution* where it is construed to be applicable to a loan by a Pennsylvania lender to a New Jersey borrower who has travelled to Pennsylvania to obtain the loan, who returns to New Jersey with the proceeds of the loan and who is required to repay the loan in Pennsylvania, merely because a second mortgage on New Jersey land, discharged in the course of litigation, is taken as security for the loan?

3. Is said act, as construed, repugnant to the Commerce Clause of the *United States Constitution* where "the fine hand of [New Jersey] lenders" may be seen in its draftsmanship, where it is designed to exclude out-of-state lenders from the New Jersey market and where it succeeds in its design by requiring out-of-state lenders to maintain a New Jersey office, thus destroying any interstate loan business with New Jersey borrowers?

4. Is said act repugnant to the Due Process Clause of the Fourteenth Amendment to the *United States Constitution* where it is construed to apply extraterritorially?

5. Is said act, as construed, repugnant to the Due Process Clause of the *United States Constitution*, where it arbitrarily subjects Pennsylvania loans to New Jersey regulation, thus precluding such loans entirely because of conflicts in detail between said New Jersey act and applicable Pennsylvania law?

6. Is said act, as construed, repugnant to Article 4, Section 1, of the *United States Constitution*, where it refuses to give full faith and credit to the Pennsylvania Consumer Discount Company Act, 7 *Purdon's Penn. Stat. Ann.* §§6201, *et seq.*, and forfeits Pennsylvania loans notwithstanding that such loans fully comply with the Pennsylvania statute and that the lenders of such loans are licensed thereunder?

Statement of the Case

This action was commenced in the Superior Court of New Jersey, Law Division, to recover on a defaulted promissory note. The lender, Oxford Consumer Discount Company of North Philadelphia ("Oxford"), was and is a Pennsylvania corporation, doing business in Pennsylvania, and licensed under Pennsylvania's Consumer Discount Company Act. The loan, which was made and was repayable in Pennsylvania, fully complied with that statute.

The borrowers, Anthony and Theresa Stefanelli ("Stefanelli"), were New Jersey residents and, by way of security, gave the lender a second mortgage on New Jersey property. The suit did not involve the mortgage, which was discharged of record during the litigation. The borrowers did not deny the debt; their defenses were fraud and illegality. Issue was joined as to the applicability of New Jersey's Secondary Mortgage Loan Act to an admittedly Pennsylvania transaction.

The trial court held for Oxford on cross motions for summary judgment. (See Appendix E.) The rationale was that Pennsylvania law controlled Pennsylvania transactions. Stefanelli appealed to the Appellate Division of the Superior Court. New Jersey's Attorney General intervened, the constitutionality of the statute having been questioned by Oxford.

The Appellate Division reversed, holding the loan entirely unenforceable under Section 29 of the New Jersey Secondary Mortgage Loan Act. (See Appendix C.) The court avoided difficult choice of law questions by discovering an "implied legislative fiat" in the statute, an implication that the act was to apply extraterritorially. 102 N. J. Super. at 565, 246 A. 2d at 469. It swept constitutional problems aside, largely relying on unproven allegations of "victimization" of New Jersey borrowers by Pennsylvania lenders. *Id.* at 569, 246 A. 2d at 471. For example, to escape the impact of the Full Faith and Credit Clause, the Appellate Division held that the Pennsylvania Consumer Discount Company Act would "offend New Jersey policy in a most sensitive area," *id.* at 575, 246 A. 2d at 474, whereas, earlier in its opinion, it came to this conclusion regarding the Pennsylvania statute: "Supervision of [Pennsylvania] licensees is comprehensive and comparable to that provided for by the New Jersey act." *Id.* at 559, 246 A. 2d at 465.

Since the case came up on summary judgment, the Appellate Division recognized it could not resolve factual disputes.* Rather than remand, however, it developed a

* Nevertheless, the Court took the questionable approach of reciting disputed facts as "enlightening background." *Id.* at 557-558, 246 A. 2d at 464.

radical theory for disposition of the appeal in favor of the borrowers. It ruled that New Jersey residence and a second mortgage on New Jersey property (both undisputed facts) sufficed to bring the Pennsylvania loan—not just the question of the validity of the security—within the ambit of New Jersey's Secondary Mortgage Loan Act.

Thus, although the loan was negotiated in Pennsylvania; all loan documents, including the note, were executed in Pennsylvania; the loan proceeds were disbursed in Pennsylvania; the loan was required to be repaid in Pennsylvania; the lender was a Pennsylvania licensee which had fully complied with Pennsylvania's consumer protection laws; and, in short, although all substantial contacts were in Pennsylvania; the Appellate Division held that New Jersey law controlled and that the Pennsylvania loan was forfeited.

The Appellate Division's ruling was handed down September 11, 1968. By supplemental decision (Appendix D), entered February 24, 1969, First Mercantile Consumer Discount Company ("First Mercantile"), appellant herein, was permitted to intervene.* Intervention was allowed, "although such action on appeal is quite rare and granted only in extraordinary circumstances," 104 N. J. Super. at 516, 250 A. 2d at 595, because of the massive, adverse impact of the Appellate Division's prior ruling on First Mercantile's position in a pending chancery litigation.**

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* The supplemental decision also granted partial, conditional relief from the retroactive effect of the prior judgment. 104 N. J. Super. at 524-25, 250 A. 2d at 600. The relief was modified in the New Jersey Supreme Court's majority opinion. 55 N. J. at 491-94, 262 A. 2d at 875-77.

** Paul and Ellen Durkin, appellees herein, are plaintiffs in the chancery litigation.

The impact was summarized by the Appellate Division:

> "First Mercantile and another Pennsylvania loan company had been sued by certain of their New Jersey borrowers, prosecuting a class action in the Chancery Division, for an injunction to restrain enforcement of all secondary mortgage loans made on the security of New Jersey realty by such corporations, although the loan agreements of plaintiffs in those actions were all executed and provided to be repaid in Pennsylvania. . . .
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> "First Mercantile filed proofs on its petition for intervention in the present case, showing it had made secondary mortgage loans secured by New Jersey realty amounting to approximately $5.5 million, all of which would be uncollectible if our decision of September 11, 1968 were applied retrospectively; that such a result would be catastrophic, causing insolvency of First Mercantile's parent corporation, throwing 50 of its employees out of work, and jeopardizing loans of about $8 million to these corporations made by various banks, insurance companies and other lenders. . . .
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> "Upon inquiry by the court, *amicus curiae* Middle Atlantic Finance Association advises that nine of its Pennsylvania members had made out-of-state secondary mortgage loans secured by New Jersey real estate, prior to September 11, 1968, aggregating $4,460,881.96 (not inclusive of loans by First Mercantile but including loans by plaintiff). An undeterminable additional amount of such loans has been made by other Pennsylvania members of that organiaztion." 104 N. J. Super. at 516-17, 250 A. 2d at 596.

Both First Mercantile and Oxford appealed to the New Jersey Supreme Court which, by a 4-3 decision handed down March 17, 1970, "affirmed [on the merits] substantially for the reasons expressed below. . . ." 55 N. J. at 491, 262 A. 2d at 875.* The majority view is persuasively refuted in Chief Justice Weintraub's dissenting opinion, to which Justices Hall and Haneman adhered. The dissent concluded:

> "It should be remembered that other States can do what we do. Our statute does not forbid loans to residents of Pennsylvania, and a New Jersey lender would violate our statute if it made a loan here on the terms of the Pennsylvania statute. The courts of Pennsylvania could give our lender the same treatment we here accord its domiciliary. I think this is shortsighted and at war with the considerations of comity which attend a choice of law. One can foresee still a further complication. If a Pennsylvania lender obtains judgment against a New Jersey borrower by service under a Pennsylvania long-arm statute, what then? We need not invite this discord to vindicate our State policy." 55 N. J. at 500, 262 A. 2d at 880.

The Questions are Substantial

This case began as a simple suit on a promissory note. It escalated into a multi-party litigation involving complex, novel constitutional issues. Its resolution by the courts of New Jersey, over the vigorous objection of Chief

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* All the constitutional questions presented in this Jurisdictional Statement were raised by First Mercantile in its brief in the New Jersey Supreme Court. Substantially the same questions were raised by Oxford in its Appellate Division brief. Oxford is separately appealing to this Court.

Justice Weintraub and Associate Justices Hall and Haneman, subjects millions of dollars in loans to forfeiture, businesses to insolvency, employees to unemployment, and borrowers to loan sharks.*

But there are far more fundamental reasons for noting probable jurisdiction here. Indeed, this appeal presents a classic case of confrontation between states, not just between private litigants. It presents this basic issue: where two states have comprehensively regulated consumer loans to protect borrowers, can one of those states, consistent with the Constitution, refuse to enforce loans lawfully made in the other state?

The grand design of the *United States Constitution* is to avoid such reciprocal interstate hostility. See *Federalist Papers*, Nos. 7 and 42. This case requires reversal because it reverses that design, promoting commercial conflict, encouraging states to disregard the statutes and legitimate interests of other states, enabling the residents of one state to escape obligations voluntarily assumed in another. As Chief Justice Weintraub put it: "We need not invite this discord to vindicate our State policy." 55 N. J. at 500, 262 A. 2d at 880.

We ask that this Court reiterate the fundamental concept that "in the matter of interstate commerce we are a single nation—one and the same people." *Pennsylvania v. West Virginia*, 262 U. S. 553, 596 (1923). We ask that this Court compel New Jersey to enforce rights lawfully obtained by Pennsylvania lenders under Pennsylvania law "not only as a matter of justice, but as a logical corollary

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* That the effect of eliminating licensed and regulated lenders is to subject borrowers to loan sharks is amply demonstrated in Felsenfeld, *Consumer Interest Rates*, 23 *Business Lawyer*, 931, 936 (1968); Curran, *Trends in Consumer Credit Legislation*, 2 (1965); Gallert, Hilborn & May, *Small Loan Legislation*, 11-14 (1932).

of the national unity of the several states. . . ." Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 *Yale L. J.*, 656, 657 (1918); see Goodrich, *Foreign Facts and Local Fancies*, 25 *Va. L. Rev.* 26, 34-35 (1938); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 *Colum. L. Rev.*, 1, 17 (1945).

1. Commerce Clause.

The guiding principles under the Commerce Clause are settled. A state may not regulate conduct which is inseparably related to commerce between states. See, *e.g.*, *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 110-11 (1910); *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 493-94 (1887). A state can, however, regulate intrastate activities which are related to interstate commerce as long as the regulation does not unduly burden or discriminate against interstate commerce. See, *e.g.*, *Eli Lilly & Co.* v. *Sav-On-Drugs*, 366 U. S. 276, 278 (1961); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209-10 (1944).

It is respectfully submitted that the decision below erred in holding that the New Jersey act, as construed, was not repugnant to the Commerce Clause, Article 1, Section 8, Clause 3, of the *United States Constitution*. It is further submitted that there are at least four reasons why the questions presented in the Commerce Clause area are so substantial as to require this Court to note probable jurisdiction of this case.

The first reason is that the decision below carved minor New Jersey elements out of an interstate transaction, labelling them local activities subject to New Jersey regulation. This Court has indicated that this process, this result, are unconstitutional. See *e.g.*, *Nippert* v. *Richmond*, 327 U. S. 416, 423 (1946). A brief review of the subject loan transaction and its New Jersey elements is

necessary to expose the error of the approach taken by the Courts below.

The loan was negotiated, executed, accepted, consummated and made payable in Pennsylvania. It involved New Jersey borrowers who travelled to Pennsylvania where they dealt with a Pennsylvania lender. They brought the loan proceeds to New Jersey and, thereafter, sent repayments on the loan to the Pennsylvania lender. The decision below alluded to the following New Jersey elements of the transaction: the borrowers' residence, the place where the mortgage was recorded and the security was located, the source of the loan repayments, and the lender's alleged operation in the New Jersey market through an intermediary.

It suffices to say that, properly viewed, the loan transaction is clearly either interstate business or Pennsylvania business. It does not involve intrastate New Jersey activities. All of the New Jersey elements are inseparably related to the interstate character of the business. Nor do they justify New Jersey regulation thereof. They simply point to the obvious fact that one of the states in this interstate transaction is New Jersey.

It should be emphasized that the second mortgage involved no intrastate New Jersey activity as it was indisputably integrated in the flow of the interstate transaction, having been sent to New Jersey for recordation and returned to the Pennsylvania lender. It followed the same course when discharged. It was a nonessential part of the transaction, legally and economically.** Further-

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* 55 N. J. at 496-98, 262 A. 2d at 878-79; see *Restatement Second, Conflict of Laws*, §195, Comment b; *Manhattan Life Insurance Co.* v. *Johnson*, 188 N. Y. 108, 80 N. E. 658 (1907).

** 55 N. J. at 497, 262 A. 2d at 879; under the Pennsylvania act a mortgage need not be taken as security. 7 *P. P. S. A.* §6213(B).

more, the lenders do not dispute that New Jersey can regulate the mortgage. But the mortgage was never in issue; the suit was on the note and the mortgage was discharged. It is the loan which is in question here. It is the loan which is regulated to the extent of forfeiture.

As to the alleged solicitation of loan business in New Jersey by Pennsylvania lenders, it must first be noted that such solicitation was disputed; that the decision below improperly relied on it in granting summary judgment. 102 N. J. Super. at 569, 246 A. 2d at 471. More importantly, even if, *arguendo*, such solicitation existed, it would be only another element of the interstate transaction at bar, another element which cannot be considered intrastate New Jersey activity subject to New Jersey regulation. In *Eli Lilly & Co.* v. *Sav-On-Drugs*, *supra*, 366 U. S. at 278-79, this Court stated: "Under the authority of the so-called 'drummer' cases, such as *Robbins* v. *Shelby County Taxing Dist.*, Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State." This Court has long adhered to this principle.

The second reason why the ruling below calls for review in the Commerce Clause area is that the New Jersey decision improperly assessed the respective strengths of the New Jersey and national interests involved and failed to achieve a proper accommodation between these competing interests. See *United States* v. *South-Eastern Underwriters Asso.*, 322 U. S. 533, 548 (1944). Only this Court can now reach the proper accommodation between these interests.

The New Jersey decision, out of provincialism, exaggerates the significance of the New Jersey elements of the loan transaction at bar. It is submitted that they do not justify the burden on interstate commerce which results

from the application of the New Jersey act to the subject loan, a burden which goes to the extent of complete destruction. The primary instrument of this destruction is Section 29 which denies enforcement of the loan unless there has been full compliance with the terms of the act. *N.J.S.A.* 17:11A-29. The burden is undue because the New Jersey and the Pennsylvania acts regulate commerce in a "comparable" way, as the opinion below admitted. 102 N. J. Super. at 559, 246 A. 2d at 465.

Another undue burden is the regulation of Pennsylvania lenders' profit which is so severe that they doubtless will be forced out of the interstate loan business. Under Section 22 of the New Jersey act the lender can make certain charges which are prohibited under the Pennsylvania statute. If he does, he violates the Pennsylvania act. 7 *P.P.S.A.* §6213(F) and (M); §6214(B). However, if he does not charge for these items, but does charge the 18% rate of interest allowable under the Pennsylvania statute, 7 *P.P.S.A.* §6213(E), the loan would then violate Section 21 of the New Jersey statute. The rub is that if the lender only charges the New Jersey rate of 14%, he will be put out of business.

There are additional undue burdens on interstate commerce: Section 2 of the New Jersey act licenses interstate commerce in contravention of the decisions of this Court, see *Eli Lilly & Co.* v. *Sav-On-Drugs, supra,* 366 U. S. at 278; *International Textbook Co.* v. *Pigg, supra,* 217 U. S. at 110-111, and Section 17 requires the Pennsylvania lender to maintain a branch office in New Jersey. 102 N. J. Super. at 572, 246 A. 2d at 472. Of course, the latter provision is not merely a burden on interstate commerce; it completely eliminates it.

The third reason why this Court should note probable jurisdiction of this case is that the New Jersey act, as

construed, discriminates against interstate commerce. The point is that there is no justification for denying access to the New Jersey borrower market to out-of-state lenders where such lenders are subject to comparable legislation. The most blatant illustration of the discriminatory thrust of the New Jersey act is the requirement of Section 3 that 50% of the stockholders of a corporate licensee be New Jersey residents for at least two years before the application is filed. Although this provision was invalidated and severed from the statute by the decision below, 102 N. J. Super. at 560-62, 246 A. 2d at 466-67, it clearly reveals the Legislature's improper motive in adopting the act. The decision below recognized the inherent evil in the provision:

> "It seems to us highly likely that section 3 had no motivation other than to favor New Jersey residents engaged in the consumer lending field as against out-of-staters." 102 N. J. Super. at 561, 246 A. 2d at 466.

The Legislature's motive was the same when it passed the other provisions of the act; its motive cannot be severed.

In this connection it should also be noted that one of the major forces behind the New Jersey act was the report of the New Jersey Real Estate Commission, a commission composed entirely of New Jersey real estate brokers. *N.J.S.A.* 45:15-15. The decision below improperly relied heavily on this report although it was extra-record evidence.

The fourth reason is that the decision below failed to give proper effect to the precedents of this Court and incorrectly relied on factually distinguishable licensing cases to sustain the forfeiture of millions of dollars of interstate loans. This is apparent from the discussion

above and need not be developed at this time. It might be observed that the reliance of the decision below on *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (Dist Ct. App. 1964), *appeal dismissed sub nom. Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1 (1965), is misplaced. As Chief Justice Weintraub pointed out in his dissent, the *Fairfax* case is plainly distinguishable. 55 N. J. at 495, n. 1, 262 A. 2d at 878, n. 1.

The New Jersey Secondary Mortgage Loan Act, as construed by the courts below, clearly violates the Commerce Clause of the *United States Constitution*.

2. Due Process.

There are two branches to this issue:

First, there is New Jersey's bald assertion of power to regulate Pennsylvania transactions through the device of refusing to enforce licensed and lawful Pennsylvania loans. We submit this violates due process, as this Court indicated in *Alaska Packers Ass'n* v. *Industrial Accident Comm.*, 294 U. S. 532, 540-41 (1935):

> "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction. . . . Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state. . . ."

Alaska Packer's has not been overruled. Nor should it be. One reason is that states are sovereign within their boundaries and not beyond. See, *e.g.*, *New York, L.E. & W.R. Co.* v. *Commonwealth of Pennsylvania*, 153 U. S. 628, 646 (1894); *New York L. Ins. Co.* v. *Head*, 234 U. S. 149,

161 (1914); *cf. F.P.C.* v. *Transcontinental Gas Corp.*, 365 U. S. 1, 20 (1961). And there is the ancient, *United States Declaration of Independence*, modern, *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964), and fundamental philosophy that government derives its power from the consent of the governed. As this Court said: ". . . [T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767 at n. 2 (1945).

Second, there is the fundamental unfairness of subjecting a business to dual, conflicting regulations; the unreasonableness of superimposing New Jersey regulatory details on Pennsylvania transactions which are already regulated by the Commonwealth of Pennsylvania. The impact is not simply the necessity of filing forms in two states, paying fees to two treasuries, reporting to and being checked by two banking and insurance departments. Nor is it merely the expense and inconvenience of opening and maintaining a "branch office" in New Jersey, which according to the Appellate Division, does not involve "invidious discrimination," 102 N. J. Super. at 572, 246 A. 2d at 472.

The impact is far more severe; the unreasonableness is more arbitrary. The result is to prevent those Pennsylvania lenders who survive the forfeiture of their outstanding New Jersey loans from doing business with New Jersey borrowers at all. The reason is that only by restricting their interest to New Jersey's 14% can they comply, whereas only by charging substantial expenses to the borrowers, as permitted by New Jersey's act, *N.J.S.A.* 17:11A-22, but prohibited by Pennsylvania's, 7 *P.P.S.A.* §§6213-14, can they continue in business.

Is this a reasonable exercise of the police power? Is it reasonable to impose dual regulation? Is it reasonable

to line the pockets of local lenders by making it difficult if not impossible for out-of-state lenders to transact loans with New Jersey borrowers? Does it do New Jersey borrowers any good to remove licensed, regulated Pennsylvania lenders from the market?

There is a clear denial of due process here.

3. Full Faith and Credit.

The *United States Constitution*, Article 4, Section 1, provides in pertinent part: "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State." The clause has been implemented. 28 *U.S.C.* §1738. It is settled that "public Acts" include state statutes. See, *e.g.*, *Broderick* v. *Rosner*, 294 U. S. 629, 644 (1935).

The loans in question here were contractual rights authorized by and arising under Pennsylvania's Consumer Discount Company Act. 7 *P.P.S.A.* §6213. Such rights must be enforced in the courts of sister states, *e.g.*, *Hughes* v. *Fetter*, 341 U. S. 609, 612 (1951), unless to do so would be "obnoxious to the public policy of the forum. . . ." *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160 (1932).

The exception is what the courts below relied upon. New Jersey's Appellate Division held that Pennsylvania's Consumer Discount Company Act would "offend New Jersey policy in a most sensitive area. . . ." 102 N. J. Super. at 575, 246 A. 2d at 475. New Jersey's Supreme Court affirmed. 55 N. J. at 491, 262 A. 2d at 875.

This reliance on the public policy exception to full faith and credit is an example of provincialism at its most extreme. See generally Goodrich, *op. cit.*, 25 *Va. L. Rev.* 26; Beach, *op. cit.*, 27 *Yale L. J.* 656. "The existence of statutes on the same subject [borrower protection] point-

ed towards harmony of policy; not repugnance." Note, 39 *Colum. L. Rev.* 860, 863 (1939). "Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy." *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 111, 120 N. E. 198 (1918) (per Cardozo, J.).

Here, the statutes of New Jersey and Pennsylvania are obviously similar; only details differ. The statutes are similar in public policy: both seek to protect borrowers "against extortionate interest charges," *Equitable Credit & Discount Co.* v. *Geier*, 342 Pa. 445, 21 A. 2d 53, 57 (1941), and "exorbitant financial practices.", 102 N. J. Super. at 555, 246 A. 2d at 463. The statutes are similar in the cost to the borrower of licensed loans. *Compare N.J.S.A.* 17:11A-21 and 22 with 7 *P.P.S.A.* §6213; see Weintraub, C. J., dissenting, 55 N. J. at 499, 262 A. 2d at 880.

While it may be argued that Pennsylvania enforcement procedures are superior to those of New Jersey, *compare* 7 *P.P.S.A.* §6211, *with N.J.S.A.* 17:11A-14, New Jersey's Appellate Division conceded at least that, under the Pennsylvania act: "Supervision of licensees is comprehensive and comparable to that provided for by the New Jersey act." 102 N. J. Super. at 559, 246 A. 2d at 465. And in some respects, *e.g.*, coverage limitations, it is perfectly clear that "the Pennsylvania statute is more protective [of the borrower]. . . ." Weintraub, C. J., dissenting, 55 N. J. at 496, 262 A. 2d at 878.

In short, Pennsylvania lenders are as well regulated as New Jersey lenders; and New Jersey borrowers are similarly protected in both states. The "mere fact" that the statutes do not exactly conform does not make one "obnoxious" to the public policy of the other. *Bradford Electric Co., Inc.* v. *Clapper, supra*, 286 U. S. at 161-62.

The public policy exception is, therefore, totally inapposite. New Jersey should be required to extend full faith and credit to Pennsylvania's Consumer Discount Company Act.

CONCLUSION

We urge that the questions presented by this appeal are so substantial as to require plenary consideration by this Court; that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

Notice of Appeal to the Supreme Court of the United States

(Filed April 3, 1970.)

Notice is hereby given that First Mercantile Consumer Discount Company, the intervenor appellant above-named, hereby appeals to the Supreme Court of the United States from so much of the final judgment of the Supreme Court of the State of New Jersey, entered in this action on March 17, 1970, as affirms the judgment of the Superior Court of New Jersey, Appellate Division, set forth at 102 N. J. Super. 549, 246 A. 2d 460 (1968). Said appellant does not appeal from so much of the New Jersey Supreme Court's judgment as modifies the Appellate Division's determination, set forth at 104 N. J. Super. 512, 250 A. 2d 593 (1969), as to the retroactive reach of its prior judgment. Specifically, this appeal is taken from the final judgment of the Supreme Court of New Jersey on the merits of this controversy and not from that Court's ruling on the extent to which its judgment will be retroactively applied.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

CLAPP & EISENBERG
Attorneys for Intervenor-Appellant
By: ARNOLD K. MYTELKA
Counsel for Appellant

APPENDIX B

Opinion of Supreme Court of New Jersey

Oxford Consumer Discount Company of North Philadelphia v. *Stefanelli, et al.*

(filed March 17, 1970)

PER CURIAM.

Subject to a qualification to be stated, the judgment of the Appellate Division is affirmed substantially for the reasons expressed below in the exhaustive opinions of Judge Conford. *Oxford Consumer Dis. Co. of No. Phila.* v. *Stefanelli*, 102 N. J. Super. 549 (App. Div. 1968), and 104 N. J. Super. 512 (App. Div. 1969).

The first opinion of the Appellate Division was handed down on September 11, 1968. Prior to that date certain New Jersey borrowers other than the defendants Stefanellis had brought suit against First Mercantile Discount Company and another Pennsylvania loan company in the Superior Court, Chancery Division, seeking an injunction to prevent the enforcement of all secondary mortgage loans made by such corporations on the security of New Jersey realty. Basically the same issues were involved in that action (which the plaintiffs were allegedly prosecuting as a class action) as in the *Oxford* case. Subsequent to September 11, 1968 some of these parties applied to the Appellate Division for leave to intervene and for a rehearing in order to be heard on the issues decided in *Oxford*. The leave was granted and the common problems in the cases were reargued. One of the primary questions presented for further consideration was whether, if the Appellate Division adhered to the view expressed in the September 11, 1968 opinion respecting the applicability of the New Jersey Secondary

Mortgage Loan Act, the judgment should be prospective or retrospective in scope. The position of the loan companies was that in no event should loan transactions made by Pennsylvania corporations licensed in Pennsylvania to make such loans and entered into before the effective date of that decision be adversely affected by it, where the loans were not only made in Pennsylvania but were repayable there and in all other respects were in conformity with Pennsylvania law. (See 104 N. J. Super. at 516).

Thereafter the Appellate Division affirmed its original holding and dealt comprehensively with the prospectivity—retroactivity issue. 104 N. J. Super. at 519-25. It held that sufficient equitable considerations were present to warrant denial of unrestricted retroactive operation of the September 11, 1968 decision. In specifying the restrictions it said:

> 1. "We have concluded that we should not now go beyond adjudicating relief from retroactivity in respect of transactions where there was no intermediation of any kind by others, operating in this State, between Pennsylvania lender and New Jersey borrower."
>
> 2. "We are clear, first, that Pennsylvania lenders obtaining New Jersey loan business on a regular continuing basis by or through agents, brokers, or representatives operating in this State, whether or not technically independent contractors, could not reasonably have been advised in advance that choice of law and interstate commerce factors would immunize the loans from the effect of the New Jersey act. As to such loans, therefore, the decision of September 11, 1968 will remain fully re-

troactive. As to any other type of case involving some degree of casual intermediation between the lender and the borrower by operative functioning in this State, the court should appraise the particular facts of the individual case for determination as to whether considerations of fairness and justice call for relief from retroactivity of the September 11, 1968 decision in such instance, according to the criteria discussed above."

3. "It is next necessary to decide whether there should be any curtailment of the lender's claim to interest and other charges where it ultimately qualifies otherwise for relief from retroactivity. As heretofore noted, plaintiff and intervenors contend that fairness would be served by requiring the borrowers to pay the interest rates and other charges (if specifically agreed to in the loan contract) allowed for such transactions by either the New Jersey or Pennsylvania statute, whichever is the lower. We think some further curtailment of recoverable interest is appropriate in order to give a degree of substantial effect to the circumstance that, in finality, the lenders have violated New Jersey law as substantively determined by our prior decision. Therefore recovery will be limited to 6% per annum simple interest computed on principal balances outstanding on funds actually advanced." (Numbering of paragraphs ours.) 104 N. J. Super. at 524-25.

We take paragraph 3 to mean that in *all* cases of loans made by plaintiffs as well as intervenors and *amici* loan companies to New Jersey borrowers and secured by secondary mortgages on New Jersey realty as defined in N.J.S.A. 17:11A-1a, which are not within the bar of para-

graph 2 above, the lender may recover the sum of the loan as actually advanced but only with 6% simple interest on principal balances outstanding. In our view the equities referred to in the second Appellate Division opinion on the subject of retroactivity of the September 11, 1968 decision require a less drastic limitation.

Assuming the loan transactions of Anthony E. and Theresa A. Stefanelli, defendants in the principal case, and Paul V. Durkin and Ellen Durkin, Lindley Henry, Jr. and Irene Henry, Paul Kuzmick and Jane Kuzmick, plaintiffs in the injunction action referred to above, had been instituted and in existence prior to September 11, 1968 and are not within paragraphs 1 or 2 quoted above, these parties are entitled to retroactive benefit of the decision of that date to this extent: They shall be liable for the agreed installment payments of the principal of the actual loan to them but without interest. Additionally, if their loan transactions resulted from intermediation within the contemplation of paragraphs 1 or 2, the September 11, 1968 decision shall be fully retroactive, and they shall have no liability on their loans.

If there are other persons not named above who were, prior to September 11, actually in litigation challenging the validity of the type of loans that are involved in this case, they too are entitled to the benefit of the rules of retroactivity just described. Further, the September 11, 1968 decision is fully applicable retroactivity to bar all recovery on New Jersey secondary mortgage loans made prior to that date and which were induced by the lender through intermediation of the nature described by paragraphs 1 and 2 above. All other New Jersey secondary mortgage loans of the type involved in this case made before September 11, 1968 which are not within paragraphs

1 and 2 above, and were not in litigation prior to that date remain unaffected by the judgment in this case.

The record shows that the trial court entered summary judgment against Mr. and Mrs. Stefanelli on their note to Oxford. Thus they had no opportunity to develop the facts respecting the intermediation by an alleged agent of Oxford which induced them to enter into the loan transaction. Under the circumstances, and even though their liability on the note is limited to installment payment without interest on the sum actually advanced to them by plaintiff, they are entitled to an opportunity to submit the facts to the trial court relating to intermediation. If such facts are undisputed and bring their case within paragraphs 1 and 2 above, they are entitled to a judgment exonerating them from liability on their note. If the evidence raises a factual dispute on the subject, the issue must be resolved by a jury or the court if the case is tried without a jury.

The judgment of the Appellate Division is affirmed as modified, and the cause is remanded to the trial court for proceedings consistent herewith.

WEINTRAUB, C. J., dissenting.

This case has an emotional overlay for it involves the distastseful business of lending money at predatory rates to people who are poor or soon will be. I would add, irrelevantly to be sure, a regret that government does not provide loans at tolerable interest charges for those of our citizens who need them most. Instead, the impecunious are made a separate class, alone required to underwrite the high credit risk attributed to some of their num-

ber. But this having been said, the fact remains that this unpleasantness has legislative approval here and elsewhere, and the case must be decided in that light and not some personal one. Indeed, there is little to choose between the New Jersey and Pennsylvania statutes here involved. Labels aside, the sundry charges under the statutes permit about the same size gouge.

And it should be stressed that we are not, on this appeal, dealing with a lender who exacts more than either statute allows or who tolerates the intervention of a "broker" who adds a pillage of his own. I have no doubt that in such circumstances our courts should turn the lender away, and may do so without the aid of a statutory denunciation of the loan as unenforceable. Nor are we dealing with a situation in which the lender actually enters our State to recruit borrowers.[1] The record does not reveal how the sizeable number of New Jersey individuals found their way to Philadelphia. For all we know at the moment, it may have been in response to advertisements published or broadcast in Pennsylvania. What we do know is that the borrower went to Pennsylvania and the loan was made and was payable there, all in harmony with a Pennsylvania statute which also is designed to protect the borrower. Nonetheless, the majority opinion in

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[1] This case is unlike *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (Dist. Ct. App. 1964), appeal dismissed *sub nom. Fairfax Family Fund* v. *California*, 382 U. S. 1, 15 L. ed. 2d 6 (1965), with respect to both the facts and the issue involved. There a Kentucky corporation solicited loans in California by mail and completed the loan transaction by mail after having a credit check made locally in California, and the question was not whether the loans should be forfeited but whether the lender should be restrained from continuing the business until a license was obtained.

effect holds the New Jersey statute had a presence in Pennsylvania and denounced every such loan to a New Jersey resident, and this notwithstanding that if the loan were made in Pennsylvania on the terms of the New Jersey statute, the loan would have violated the Pennsylvania law.

If our Legislature ordained that every loan made anywhere in the world to a citizen of New Jersey shall be wholly void unless the loan is on terms authorized by New Jersey law, I suspect we would waste little time on that enactment. Yet this, I believe, is precisely the rule the majority opinion innovates and applies. This would be evident at once if the scene were not obscured by the fact that the lender took a "secondary mortgage" on New Jersey property as collateral. But the issue is not whether the mortgage is valid, but whether the loan itself is forfeited because of the existence of our statute, and upon that question the nature of the security cannot reasonably be pivotal.

Indeed, it is hard to grasp the true role of the mortgage under our statute. We can be sure the Legislature was not concerned with the integrity of the real property system of the State, for obviously the mortgage creates no title problem. Rather the Legislature must have had in mind the oppressive capacity of the threat of foreclosure. Yet the statute does not really implement that theme. The amount of the loan does not depend upon the value of the security. The loan may be in any amount whatever, provided only that the lender takes a "secondary mortgage." In this respect the Pennsylvania statute is more protective, for it, like most statutes permitting charges above the basic interest rate, at least fixes a monetary limit upon the loan. 7 P. S. § 6214A. And not only need there be

no relationship under our statute between the value of the security and the amount of the loan, but more than that, the real property need not belong to the borrower or be his home, for the statute requires only "a mortgage upon any interest in real property used as a dwelling with accommodations for not more than 4 families." N.J.S.A. 17: 11A-1a. Nor must the property be in New Jersey, or the borrower a resident of this State.

One need not be unusually perceptive to see the fine hand of lenders in the drafting of this legislation, for, there being no required connection between the value of the security and the loan, the mortgage provision simply enables the lender to loan, at the high charges authorized by this statute, any amount the lender chooses to risk, provided only that the lender does not fail to take a secondary mortgage as a qualifying facade. Indeed, we were told in this case, and also at a public hearing held last year (with respect to whether the holder of a note and mortgage should be required to foreclose a mortgage before suing on the note), that the secondary mortgage (whatever its *in terrorem* effect may be on the borrower) is not, realistically, security for these loans; that the economics are such that a foreclosure is a waste of money and hence is rarely pursued.

In any event, the "secondary mortgage" is not so central to the fairness of the transaction as to distinguish this statute from any other of our usury statutes with respect to the immediate issue, *i.e.*, whether a loan made outside our State to a resident of our State is wholly void because, although obedient to the law of the State where the loan was negotiated, made and payable, the loan is not on terms which a statute of ours would permit if the loan were made here. If the Pennsylvania loan were made without the mortgage security (and under Pennsylvania

law the lender is not required to take that security), the terms of the loan would still clash with those of our statute. These are sundry pressures which one State might permit and another might not, such as a chattel mortgage, or a wage assignment, or a power of attorney to confess judgment. The greatest oppression may be in the interest rate itself, and the threat of judicial enforcement of the promise to pay it. If it is correct to forfeit a foreign loan because a secondary mortgage was taken, it would be equally correct to forfeit every such loan for any other departure from our domestic statutory scheme.

That is why I believe the majority opinion must ultimately amount to this extraordinary proposition, that any loan to a New Jersey resident made anywhere is wholly void if it would violate our usury statutes if made here, even though the loan was authorized by the law of the place where it was negotiated, made and payable.

When we speak of "choice of law," we ought not to be blind to the consequences proposed. It may not be unreasonable to construe an insurance policy in accordance with the law of the place of residence of the assured, or to deny a specific remedy, or to limit the fruit of a transaction. But it should not be assumed that considerations which will lead to such consequences under "choice of law" will also support a forfeiture of what a party to the transaction has paid. It is one thing to refuse some measure of relief. It is dramatically different to denounce the transaction as void and to forfeit what was lawfully loaned under the law of the place of the loan.

As I understand them, the opinions in the Appellate Division and the majority opinion in our Court conclude that the Legislature itself dictated the "choice of law" and mandated the forfeiture of a loan negotiated, made

and payable in another State. I cannot find a trace of any such legislative decision.[2] There is not a single provision in the statute which intimates that New Jersey residents will carry the statute in their pockets wherever they go. The statute speaks only of loans made here. N.J.S.A. 17:11A-2 requires the issuance of a "license," and N.J.S.A. 17:11A-17 requires the licensee to keep books and records, not in Pennsylvania, Arizona, California, or Hawaii, but "at its place or places of business in this State." That the statute was intended to deal only with loan transactions within this State is perfectly evident from N.J.S.A. 17:11A-3, which required (unconstitutionally, as later adjudged) that an applicant for a license "shall have been a bona fide resident of this State for a period of at least 2 years prior to the date of filing the application for such license" and that in the case of a corporate applicant, the holder or holders of at least 50% of the stock "shall have resided in this State for a period of at least 2 years prior to the date of filing the application." In view of those terms, it cannot be said the Legislature itself made a "choice of law" and dictated that whenever a conflict-of-laws problem arises, the courts must apply the provision of N.J.S.A. 17:11A-29 that "No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the pro-

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[2] Compare the provision of N.J.S.A. 17:10-20 of the "Small Loan Law," as amended by L. 1967, c. 94, § 16, which speaks expressly of loans made elsewhere to a resident of our State and which purports to deny enforcement of such loans except when "the amount of interest, discount, consideration or other charges for such loan, demanded to be paid in such action, does not exceed that permitted to a licensee by this chapter for a loan of the same amount payable in the same manner."

visions of this act." Indeed, that view of the statute must condemn it as plainly arbitrary, for the statute would then mean that a secondary mortgage upon the real property described in the statute will void every loan, made upon any terms whatever, unless the loan is made by someone who is licensed under this statute and is present in New Jersey.

The "choice of law" issue is in our hands without any legislative prescription. I think it unreasonable to forfeit a loan upon the factual hypothesis now before us. Rather, the sensible course is to sustain the transactions with whatever modification our local policy may be thought to mandate. Thus, if the interest rate is found to be hostile to a strong legislative policy, it may be reduced. Here, as already noted, the Pennsylvania statute and the New Jersey statute seem to authorize nomenclature to one side, the same total exaction from the borrower. Or if the secondary mortgage as such is thought to be intolerably offensive to our statute, we could order the mortgage cancelled. So, too, we could deny any other remedy the loan agreement may give the lender if that remedy is thus offensive. See *Restatement Second, Conflict of Laws, Part II* (Proposed Official Draft, 1968), §§ 195 and 203. Indeed, such relief, if justified, should not be limited to borrowers who were or are residents of our State, for the same policy considerations must protect as well any borrower the lender pursues in our jurisdiction.

It should be remembered that other States can do what we do. Our statute does not forbid loans to residents of Pennsylvania, and a New Jersey lender would violate our statute if it made a loan here on the terms of the Pennsylvania statute. The courts of Pennsylvania could give our lender the same treatment we here accord its domiciliary. I think this is short-sighted and at war with the

considerations of comity which attend a choice of law. One can foresee still a further complication. If a Pennsylvania lender obtains judgment against a New Jersey borrower by service under a Pennsylvania long-arm statute, what then? We need not invite this discord to vindicate our State policy.

Hence, wholly apart from any constitutional issue, we should not forfeit the loan negotiated, made and payable in another State merely because the borrower was a resident of New Jersey and the terms of the loan, valid where made, do not coincide with what our statute requires or permits. I would reverse the judgment and remand the matter to the trial court for trial of the remaining issues, including the question whether there was an unauthorized brokerage charge to the knowledge of the lender.

Mr. Justice Hall and Mr. Justice Haneman join in this dissenting opinion.

APPENDIX C

Opinion of the Superior Court of New Jersey, Appellate Division

Oxford Consumer Discount Company of North Philadelphia v. Stefanelli, et al. (filed September 11, 1968).

CONFORD, S. J. A. D. This appeal presents important questions relating to the validity and applicability to plaintiff, a Pennsylvania loan company not authorized to do business in New Jersey, of the Secondary Mortgage Loan Act of 1965 (L. 1965, c. 91, N.J.S.A. 17:11A-1 *et seq.*),[1] and regulations of the Commissioner of Banking and Insurance promulgated pursuant thereto, more specifically in respect of its loan to defendants, residents of New Jersey, secured by a second mortgage on their Newark home. The Attorney General has been granted leave to intervene on the side of defendants to defend the validity of the act and regulations; and Middle Atlantic Finance Association to file a brief *amicus curiae*, which has been helpful. It has also participated in the oral argument.

The Superior Court, Law Division, granted summary judgment for $5,071.82 in favor of plaintiff in its action on a note executed June 6, 1966 by defendants at the Philadelphia office of plaintiff and there delivered to it, that transaction being purportedly authorized by the Pennsylvania statute, *Tit.* 7, *Purdon's Pa. Stat.*, §§ 6201-6219 ("Consumer Discount Company Act"). At the same time the court denied defendants' motion for summary judgment. Enforcement of the mortgage taken as security for the loan at the same time the note was delivered was not sought or involved in the action.

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[1] Reference herein to section numbers of the Act will identify corresponding numbers in N.J.S.A. E.g., section 1 is N.J.S.A. 17:11A-1.

Opinion of the Superior Court of New Jersey, Appellate Division

Although the scope of defenses to the action now advanced is not identical with those set forth in the original pleadings, we have concluded that the questions of public policy implicated in the appellate arguments are so significant and the desirability in the public interest of present judicial determination thereof so obvious that we ought to decide all relevant legal questions argued on the appeal insofar as the record permits us to do so. None of the parties has contended for a narrower approach.

Basically, defendants and the Attorney General argue that the Secondary Mortgage Loan Act of 1965 is applicable to this transaction; and that there were several violations of that act in the course of the transaction, thereby calling into play section 29 of the act precluding enforcement in the courts of this State of any obligation arising out of a secondary mortgage loan not negotiated and made in full compliance with the provisions of the act. Defendants also contend there was fraud by plaintiff in that they were not advised and did not know that the papers they signed included a mortgage on their home.

Plaintiff asserts the New Jersey statute does not and constitutionally cannot apply to this transaction; that the loan was valid under the Pennsylvania statute regulating such transactions; that conflict of laws principles call for application of the Pennsylvania rather than the New Jersey statute in resolving the validity and enforceability of the loan, and that denial of enforcement of the cause of action by New Jersey would violate the due process, equal protection, interstate commerce and full faith and credit clauses of the United States Constitution.

Opinion of the Superior Court of New Jersey, Appellate Division

I. Legislative Background

The Secondary Mortgage Loan Act of 1965 emerged as a compromise of proposals embodied in three bills in the 1965 session of the Legislature, *Assembly Nos.* 522 and 732, and *Senate No.* 244. Its adoption was preceded by widespread complaints to the authorities concerning false and fraudulent advertising of the availability of loans and terms thereof and the exaction of exorbitant rates of interest and concomitant other charges from needy borrowers. Typically, the lenders in these transaction required the furnishing by borrowers of mortgages on their homes as security, and generally the financial difficulties of the borrowers were such that the mortgages given were necessarily junior liens to existing mortgages on their properties.

These conditions were fully documented in a report dated January 5, 1965 from the Secretary-Director of the New Jersey Real Estate Commission to Governor Hughes concerning the results of an investigation by the Commission of these abuses. Significant in relation to some of the legal questions presented herein is the statement in said report: "Our review showed that, in most cases, the New Jersey second mortgage operator would contact or be contacted by a financial outlet, usually in the Philadelphia area, where money was available for second mortgages if a specific procedure was followed." The report showed that the customary procedure involved the use of New Jersey-based brokers, who made contact with or were approached by New Jersey prospective borrowers, in the latter instances usually as a result of advertisements. The broker then would bring the borrower to the financing loan company for consummation of the transaction, frequently in such nearby but out-of-state locations as Philadelphia.

Opinion of the Superior Court of New Jersey, Appellate Division

In approving the bills as enacted Governor Hughes publicly stated:

> "Assembly Bill No. 732 represents a major step forward in the vital area of consumer protection. With the enactment of this bill, New Jersey maintains its place in the forefront of States which have been quickest to recognize and curb the activities of those who would prey upon the public under the guise of legality and respectability. New Jersey once again has branded unethical conduct as unlawful conduct in order to protect its citizens from the hardships of exorbitant financial practices."

II. The Act and Regulations

The act defines a "secondary mortgage loan," in effect, as a loan not to be repaid in 90 days or less which is secured by a mortgage on real property used as dwelling for not more than four families, which property is subject to the lien of a prior mortgage or mortgages, or the purchase of any interest in such a loan. *Section* 1(a). The business of making such loans is restricted to licensees qualifying under the terms of the act. *Section* 2. The holders of 50% of the stock in a corporate licensee, and any individual licensee, must have resided in this State for two years prior to applying for a license. *Section* 3. There are detailed provisions concerning procedure on applications for licenses and renewals thereof to the Commissioner of Banking and Insurance, including payment of an annual fee of $25 and filing a corporate surety bond of $5,000. *Sections* 4 *et seq.* Licensees must indicate location of "the office or branch," *Section* 7; and the application, if by a corporation, must state "where the busi-

ness is to be conducted," *section* 4. There are provisions for hearings on refusals, suspensions or revocations of licenses. *Section* 11. The Commissioner may investigate activities, and examine books and records, *section* 14, which must be maintained by the licensee at its place or places of business in this State, *section* 17.

Section 21 sets forth a mathematical formula for ascertaining the gross dollar amount of interest which the lender may deduct in advance from the face amount of the loan, given the predetermined net proceeds of the loan to be made available to the borrower on closing and the number of installment payment periods for the whole term of the loan and for any calendar year. The parties agree that the formula produces about 14% simple interest per annum on outstanding unpaid principal balances.[2]

Maximum incidental charges which may be made by the lender in respect of "costs, fees, services, points and premiums" are specified as: appraisal and inspection—$50 per parcel of land mortgaged; credit investigation—$15; search fee—$50 per parcel; legal fees—5% of amount of loan, not exceeding $250; recording and filing fees, not to exceed $5 per document. *Section* 22. Borrowers may not be required to pay any fee for the procuring or placement of the loan, but such fees may be paid by the lender to an attorney or licensed realty broker. *Id., subsection* (*b*). The borrower "shall not be compelled to purchase" from the licensee fire, life or title insurance policies. *Id., subsection* (*c*).

Among a variety of kinds of provisions which may not be included in any loan instrument are a power of at-

[2] Plaintiff states that the comparable allowable rate under the Pennsylvania act is 17.38%.

torney of any kind, including any power to confess judgment and any provision whereby the debtor waives any rights accruing to him under the act or any other law. *Section* 23.

The act is not applicable to banking institutions, savings banks, federal savings and loan associations or any "insurance company or other financial institution * * * subject to any other law of this State or the United States" regarding mortgage loan transactions by such institutions. *Section* 31.

We have already mentioned *section* 29, which declares that no obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless negotiated and made in full compliance with the provisions of the act.

Other unmentioned provisions of the act are not implicated in the issues here raised.

Pursuant to his rule-making power under *section* 30 of the act, the Commissioner of Banking and Insurance has promulgated a set of rules, two of which are involved in this litigation. The first is Rule 1, reading:

> "Notwithstanding the place of execution, nominal or real, of a secondary mortgage loan, if the real property is located in this State, said secondary mortgage loan will be deemed to be subject to the Secondary Mortgage Loan Act of 1965 * * *."

The second is Rule 5(d), under which the lender is required to notify the borrower in writing that he has the right to the advice of counsel of his own choosing before signing the loan papers.

Opinion of the Superior Court of New Jersey, Appellate Division

III. The Instant Transaction

Most of the pertinent facts are undisputed; the parties disagree as to others. We propose to decide this appeal on certain of the material facts which are palpably free of any genuine issue and suffice as a matter of law to dictate judgment for defendants. Certain of the undisputed facts have already been related. Some of the assertions as to disputed facts will be mentioned as enlightening background.

Defendant Anthony E. Stefanelli made two affidavits in resistance to plaintiff's motion for summary judgment, alleging the following. Prior to June 6, 1966 (when he made the loan) he was "contacted by a brokerage firm in South Jersey who asked [him] whether [he] needed a loan as [he] had accumulated some debts which [he] wanted to consolidate. Shortly thereafter [he] was contacted by Rodney Radhill, of 1401 Reed Street, Philadelphia, who informed [him] that he would be able to procure the money for [him]." On June 6 Radhill took him to plaintiff's office where he executed several papers, including a mortgage on his home. However, it was not stated before or during the transaction that this involved a mortgage, and defendant did not "believe" this was a mortgage transaction at any time. After he received the net proceeds of the loan ($937.34; this was the balance after payment during closing by lender of certain of defendant's prior obligations in addition to prepaid interest and other charges on the loan; see *infra*), Radhill cashed the check and retained $350 thereof as the price of a small portable television set he "sold" defendants, explaining he was not allowed to charge a brokerage commission for a loan. Only after he received, at a later

date, a statement of the loan, did Stefanelli realize he had executed a mortgage on his home. Stefanelli further asserted in his affidavit that he was "compelled" to purchase creditor life insurance and creditor accident-health insurance, the premiums therefor having been "incurred" over his objections.

Plaintiff's sole evidential showing on the motion as to Radhill's part in the transaction is an affidavit of its manager that "Plaintiff does not have and never had an agent by the name of Rodney A. Radhill and plaintiff made no requirement for defendants to purchase anything from anyone in order to obtain the loan." However, plaintiff failed to answer responsively an interrogatory requesting it to state who was present at the loan closing.

There is no dispute that defendants did on June 6, 1966 at the Philadelphia office of plaintiff sign and deliver to it a promissory note in the amount of $4,535.28 payable in 36 monthly installments of $125.98 each, beginning July 6, 1966, and also a second mortgage on their Newark home as collateral security for the note. The note contained a power of attorney for entry of judgment thereon. It is conceded there were deductions from the face amount of the note of $1,020.43 for interest, $15 for service charge, creditor life insurance and creditor accident and health premiums of $102.05 and $145.13, respectively, and recording and releasing fees of $6.25. The amount of allowable interest under *section* 21 of the New Jersey act would have been some $758. Plaintiff says it did not "compel" defendants to buy the insurance. From the loan proceeds plaintiff at the direction of defendants paid their existing debts: $500 to Household Finance Corp.; $500 to Central Finance; and $1,309.08 to Geral-

dine Sica; leaving a balance of $937.34 disbursed to defendants (from which they paid $350 to Radhill for the television set, as noted above).

IV. The Pennsylvania Statute

The subject matter regulated under the Consumer Discount Company Act (cited above) is the business of lending sums of $3,500 or less (whether secured or unsecured) and charging interest and fees which aggregate more than 6% per year on unpaid principal balances. *Tit.* 7, *Purdon's, op. cit.*, §6203. Such business is restricted to Pennsylvania corporations licensed by the Secretary of Banking. *Ibid.* Supervision of licensees is comprehensive and comparable to that provided for by the New Jersey act. The amount of interest chargeable is formulated differently from the New Jersey act. It is fixed at $7.50 per $100 per year when the "contract is repayable" within 36 months; if for a longer term, then at $6 per $100 for the remainder of the term. Such interest is computed on the face amount of the loan (including all permissible charges) for the full term of the contract and deductible in advance notwithstanding provision for installment payments.[3] *Section* 6213, subd. E. By way of comparison with the stated $7.50 rate, the formula set forth in *Section* 21 of the New Jersey act would permit an amount of interest which, if computed on the Pennsylvania basis for the $7.50 rate, would work out to about $5.90 per $100 per annum.

[3] The amount of the instant loan complied with the $3,500 limitation since the act provides that that limitation may be exceeded by the amount of interest or other charges authorized by the act. *Section* 6213, subd. E.

The Pennsylvania act also allows: service charge up to $15; extension or deferment charges at the rate of 1½% per month on the amount in arrears; actual official recording fees; the premium for insurance *required or obtained*[4] as security for the loan; attorney's fees and court costs in collection of any contract in default.

Plaintiff argues that comparing allowable interest charges under the New Jersey and Pennsylvania statutes is misleading; that the "cost of money" to the borrower should include the supplemental loan charges, which are potentially heavier in New Jersey. However, the comparison of potential cost of money under the respective statutes will not be determinative, in view of our approach to the issues as developed hereinafter.

We approach the legal questions presented for decision.

V. Residence Requirement—Severability

We have no hesitancy in agreeing with the contention of plaintiff that *section* 3 of the act, requiring that holders of at least 50% of the stock of a corporate applicant (as well as any individual applicant) for a license shall have been residents of New Jersey for two years prior to the application, is unconstitutional. The Attorney General accepts that proposition, acceding to a 1966 unreported decision of the Law Division to that effect. Defendants have offered no defense of the provision, and we conceive none. No reasonable relationship whatever has been advanced or is perceived between the objects

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[4] Compare *section* 22 (c) of the New Jersey act, which provides the borrower shall not be "compelled" to purchase fire, life or title insurance.

of the legislation and the residence requirement for shareholders of a corporate licensee. The act does not require that licensees must be domestic corporations or that any of their officers, agents or managers be residents. *Cf. Osborn* v. *Ozlin*, 310 U. S. 53, 60 S. Ct. 758, 84 L. Ed. 1074 (1940); in respect of such requirements a debatable regulatory justification could perhaps be argued. It seems to us highly likely that *section* 3 had no motivation other than to favor New Jersey residents engaged in the consumer lending field as against out-of-staters. We conclude that the requirement of residence for shareholders is void as violative of due process and equal protection. In accord: *Miskell* v. *Termplan Incorporated of Houston*, 381 S. W. 2d 129 (Tex. Civ. App. 1964). There is possibly also implicated the privileges and immunities clause of the United States Constitution, asserted derivatively in this action by plaintiff on behalf of its shareholders. *Cf. Hess* v. *Pawloski*, 274 U. S. 352, 355-356, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

However, defendants and the Attorney General contend that *section* 3 is severable from the remainder of the act, and that plaintiff continues to be barred from recovery on the note, under *section* 29, by virtue of violations in this transaction of other still viable provisions of the statute. We agree.

This enactment has no specific severability clause. But that fact is not determinative of the question, particularly in the light of the general, overall severability clause in R. S. 1:1-10. The governing principle in all cases is whether it can be concluded that the Legislature "designed that the enactment should stand or fall as a unitary whole." *State by McLean* v. *Lanza*, 27 N. J. 516, 527 (1958). It was further there said:

> "[E]ven if there be no such express declaration of separability, an unconstitutional provision in a statute does not affect the validity of a separate article or clause of the enactment, if otherwise valid, unless the two are so intimately connected and mutually dependent as reasonably to sustain the hypothesis that the Legislature would not have adopted the one without the other. Where the principal object of the statute is constitutional, and the objectionable provision can be exercised without substantial impairment of the general purpose, the statute is operative except insofar as it may contravene fundamental law. And the question is to be considered in the light of the settled principle that a permissible doubt as to validity is to be resolved in favor of the enactment" (at p. 528).

In particular reference to a regulatory ordinance it has been stated that the ultimate test is whether the ordinance, "stripped of those provisions which are invalid, remains a comprehensive and cohesive regulatory ordinance with appropriate sanctions for its enforcement." *Cranberry Lake Quarry Co.* v. *Johnson*, 95 N. J. Super. 495, 517 (App. Div. 1967), certification denied 50 N. J. 300 (1967). We deem this applicable as well to a regulatory statute.

Applying the indicated criteria, we have no doubt that the statute would have been intended by the Legislature to stand, even with the residence requirement of *section* 3 deleted as void. The legislative background data demonstrates an urgent sense of the necesity in the public interest of close regulation of the operations of the secondary mortgage lending industry to the extent of

their effect upon New Jersey residents. All of the statutory policing regulations and the substantive provisions governing permissible interest rates, other charges and other provisions of loan contracts are left functionally intact and operative notwithstanding invalidation of the shareholder-residence requisite of *section* 3. We therefore hold the statute survives the excision of *section* 3. See *Miskell* v. *Termplan Incorporated of Houston, supra*, 381 S. W. 2d, at p. 131.

VI. Conflict of Laws

Plaintiff contends that appropriate choice-of-law principles require the application of Pennsylvania rather than New Jersey law to the question of the validity of this loan; and since the transaction was valid under Pennsylvania law recovery is not to be denied because of transgressions of the New Jersey act. Strong reliance is placed on *section* 346K, "Contracts for the Repayment of Money Lent," as set forth in *Restatement, Conflict of Laws 2d, Tentative Draft No. 6* (1960). This section was substantially adhered to in the reformulation thereof in the *Proposed Official Draft, Part* II (1968), as §195 thereof, reading:

> "§195. Contracts for the Repayment of Money Lent.
>
> The validity of a contract for the repayment of money lent and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that repayment be made, unless, with respect to the particular issue, some other state has a more significant relation-

> ship to the transaction and the parties, in which event the local law of the other state will be applied."

Comment (b) states that in determining whether there is a state with a more significant relationship to the transaction and to the parties, resort should be had to the principles set forth in *section* 6 (to be found in *Proposed Official Draft, Part* I (1967)). *Subsection* (1) thereof, which we think determinative of the instant issue, reads:

> "(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

When there is no such directive, various other principles may come into play, including "the relevant policies of the forum." *Subsection* (2) of *section* 6. As we deem *subsection* (1) the guideline which we should follow, not merely because it is embodied in the *Proposed Official Draft* but for the reason that it is inherently sound, we need not explore the alternative contention of defendants that conflicts principles ordinarily applicable will bow where the result would strongly offend a public policy of the forum state or where the preponderance of the significant contacts with the transaction are situate there. See *HIMC Investment Company* v. *Siciliano*, 103 N. J. Super. 27 (Law Div. 1968), where the instant act was held applicable to a transaction entered into in Pennsylvania on the basis of such principles, but where New Jersey contacts were more pronounced than here. See *Kievit* v. *Loyal Protect. Life Ins. Co.*, 34 N. J. 475, 492-493 (1961).

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Defendants contend that *section* 6, *subsection* 1, of the *Restatement, supra,* finds present application in that New Jersey has expressly ordained that the Secondary Mortgage Loan Act should apply to all such loans where the secondary mortgage exacted is on property situate in this State, no matter where the loan contract is executed—in other words, settled the choice of law problem involved. They refer to Rule 1 of the regulations promulgated by the Commissioner of Banking and Insurance, which is to that effect. However, we cannot agree that the Commissioner would have authority under his delegated rule-making power (under *section* 30, to make such rules "as shall be necesary to the establishment and maintenance of a standard of fair, equitable and honest conduct in the transaction of secondary mortgage loans") to promulgate a choice-of-law rule if the statute contained no such provision, express or implied. This is a rule of substantive law, not an administrative implementation of regulatory policies broadly reflected in the language of the statute itself. "The distinction is between the making and the execution of the law." *Abelson's, Inc. v. New Jersey State Board of Optometrists,* 5 N. J. 412, 423-424 (1950).

But we do agree with the alternative argument of defendants that the statute, in the light of its avowed objectives, particularly as illuminated by the legislative history, evinces an unmistakable intent that any secondary mortgage loan, as defined in the act, made by a New Jersey resident involving New Jersey realty be subject to the act notwithstanding execution of the loan documents out of the state and in favor of a foreign corporation. One of the primary evils cited in the investigation preceding adoption of the law, as indicated above, was the enticing of needy New Jersey residents to loan companies

in the Philadelphia area. While it is true that the text of the statute does not express any conditions or qualifications of its applicability in terms of the place of making of the loan, the residence of the lender corporation or the borrower, or even the location of the mortgaged property, the manifest purpose of the legislators in enacting, and of the Governor in approving, this statute was to protect New Jersey residents from overreaching mistreatment of them by out-of-state as well as local lenders taking back secondary mortgages on New Jersey residential real property.

Legislative intent can be discerned by background circumstances revealing the evil sought to be remedied and as thus illuminated may be read into the statute by implication with the same effectiveness as though expressly declared therein. *State* v. *Gill*, 47 N. J. 441, 444 (1966); *Alexander* v. *N. J. Power & Light Co.*, 21 N. J. 373, 379 (1956).

In the official *comment* (b) to *section* 6 of the *Restatement, Conflict of Laws* 2d (1967), *supra*, the reporter says:

> "b. *Intended range of application of statute.* A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the *intended range* of application of a particular statute. The court should give a local statute the range of applica-

tion intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid." (Emphasis added.)

We have no difficulty, applying these precepts, in ascertaining the legislative intention in this instance to be as formulated above and thus as settling (subject to constitutional questions) the choice-of-law issue here under discussion by implied legislative fiat.

Plaintiff calls to its aid decisions elsewhere which in varying unrelated contexts have held loans or other contracts made outside the forum state to be unaffected by local statutes regulating the doing of busines or excess to local courts, frequently on federal constitutional grounds, and it argues the Legislature must be presumed not to have intended an unconstitutional result. But this contention begs the present issue—*i.e.*, the actual intent of the New Jersey Legislature as to the subjection to this law of out-of-state loans to New Jersey borrowers, secured by mortgages on New Jersey lands. We deal with the constitutional problems separately hereinafter.

VII. Equal Protection

Plaintiff asserts that the definition of a secondary mortgage loan in the statute establishes an arbitrary classification among holders of promissory notes, not required by the public policy of the State and consequently depriving plaintiff of the equal protection of the laws

guaranteed by the Fourteenth Amendment. The position is that there is no rational basis for creating for the special treatment of this act, out of the whole category of mortgage lenders, those whose obligation is secured by a secondary mortgage; nor any basis for including mortgages which are only partially the collateral taken for the loan. But we think it obvious that there is. The investigations which preceded adoption of the act revealed that there was a characteristic syndrome pervading the area of transactions infected by the evil sought to be ameliorated. This consisted of the situation of moderately circumstanced persons owning a home or small multi-family dwelling, already heavily encumbered by a first mortgage, and who, being unable to raise money to meet pressing needs from conventional lenders at ordinary interest rates, were compelled to go to high-interest and premium-exacting lenders who typically tightened their security by exacting a secondary mortgage on the borrower's home.

The question is not whether the act dealt with all facets of the evil but whether, in the light of the end sought, it rationally dealt with any distinct phase of it calling for attention and differentiable on a reasonable basis from any others. *David* v. *Vesta Co.*, 45 N. J. 301, 314-317 (1965), and cases cited therein. In view of the background data, and mindful of the heavy presumption of constitutionality of legislation, we are satisfied that the legislative classifictaion here impugned is valid.

VIII. Due process and Interstate Commerce

Plaintiff and *amicus curiae* lay major emphasis on the argument that application of the act to the instant trans-

action creates an undue burden on interstate commerce, in violation of the commerce clause of the United States Constitution. It is also argued that applying the act to loans made outside the state denies due process. It will be convenient to consider these positions together, as the pertinent considerations intermesh.

The complexity of the problems an the infinite variety of factual and policy considerations presented in the whole area of transactions having multi-state aspects has produced much confusion and many divided and inconsistent rulings in the courts, state and federal, over the validity of the efforts of states to regulate local aspects of interstate transactions. "The question as to what is the proper dividing line between the respective powers of Congress and those of the states to regulate commerce has been declared to be the most perplexing and confusing topic in American constitutional law." 15 *C. J. S. Commerce* §5, *p.* 388. That the powers of Congress in regulation of interstate commerce, when exercised, are paramount to and preemptive of those of the states, is elementary. *Id.*, §6, *p.* 390. Of more tenuous substance is the rubric that even as to areas not entered by Congress state regultaion of the subjects of interstate commerce must not "interfere" with or place "undue burdens" upon such commerce. *Id.*, §10, pp. 403-404.

The matter was succinctly stated in *Needl v. Giroux*, 24 N. J. 224 (1957) (involving stoppage of interstate cargo of cigarettes to investigate possible violation of the New Jersey cigarette tax law):

> "A state may protect its local interest by reasonable measures which do not unduly interfere with

interstate commerce, in the absence of federal legislation occupying the area" (at p. 228).

And, in upholding legislation regulating the price of milk moving in interstate commerce, the court said, in *National Dairy Products Corp.* v. *Hoffman*, 40 N. J. 475 (1963):

> "* * * [T]he problem is not whether such [interstate] commerce is interfered with but whether the proved interference constitutes an undue or excessive burden on that commerce. Incidental interference or indirect burdens, which find their source and justification in a reasonable exercise of the police power of a state affected by the transaction, are not transgressive of the United States Constitution, in the absence of some controlling or superseding federal enactment or regulation. Regulation of the price of milk was directed by the Legislature to meet the requirement of local conditions and to protect the public interest from what it found to be the adverse effects of those conditions" (at p. 488).

There can hardly be any question that, *prima facie*, state regulation of consumer loan practices deleteriously affecting substantial numbers of the citizenry is a fit and proper exercise of local police power notwithstanding any incidental effect on interstate commerce. See *Metropolitan Finance Corp.* v. *Matthews*, 265 Wis. 275, 61 N. W. 2d 502 (Sup. Ct. 1953), sustaining state licensing procedures for collection agencies in application to an out-of-state firm doing essentially interstate commerce, where the court quoted the following highly instructive language of the Supreme Court in *United States* v. *South-Eastern Underwriters Asso.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944):

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather *whether, in each case, the competing demands of the state and national interests involved can be accommodated*" (at p. 548, 64 S. Ct., at p. 1171, emphasis added).

Similarly, in *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944), Mr. Justice Frankfurter wrote:

> "Whatever may be the generalities to which these cases give utterance and about which there has been * * * relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances" (at p. 211, 64 S. Ct., at p. 973).

These, we think, are the approaches which should guide us here. New Jersey's strong interest in protecting its citizens from victimization by lenders operating on the

other bank of the Delaware, pursuing their activities through cooperative relations with brokers (whether or not technically agents or independent contractors) who effectively negotiate with the borrowers in this State, should outweigh any incidental effect upon the interstate aspects of the transaction, and save the local legislative remedy for the existing abuses from invalidation under either the commerce or due process clauses.[5]

A significant modern decision relevant to this discussion is *Robertson* v. *People of State of California*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946). Involved was the validity of a state statute requiring any insurance agent, broker or solicitor to obtain a state license, in its application to one soliciting for a foreign insurance company not admitted to do business in the state. The court treated the regulation as one of a series stated in the statute to be "designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship" (at p. 447, 66 S. Ct., at p. 1164). In sustaining the validity of the statute whether the agent's acts were regarded as "in" commerce or only as "affecting" it (at p. 448, 66 S. Ct. 1160), the court cited previous Supreme Court decisions sustaining, in the absence of contrary action by Congress, the licensing of agents or brokers for the sale of interstate transportation in order to

[5] It of course does not matter that in this particular transaction the loan terms may not have been as egregious as the generality of the practices which led to enactment of the statute. If the act applies, and is valid, it must be given even-handed effect in all cases within its coverage.

prevent fraud; trainmen engaged in interstate commerce, to secure their competence; the sale on commission of interstate consignments of farm produce to secure honest dealing and financial responsibility; and the activities of custom brokers to secure responsibility in the state courts on claims arising locally. *Ibid.*

It would seem that in comparison with the instances just stated, the instant situation is, *a fortiori*, free from constitutional interdiction on commerce grounds. Indeed, in other phases of its arguments plaintiff contends that this transaction was wholly an intrastate Pennsylvania transaction.

The closest indication available as to how the United States Supreme Court would react to the commerce argument in a case such as this is afforded by the court's dismissal of the appeal in *Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1, 86 S. Ct. 34, 15 L. Ed. 2d 6 (1965), "for want of a substantial federal question." The appeal there was from a judgment of the California District Court of Appeal and denial of hearing thereon by the Supreme Court of that state, opinion reported in *People v. Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (1965).

In that case the state Attorney General sought an injunction against the conduct by defendant, a Kentucky corporation, of its small loan business in California without securing a license required by the California statute regulating that type of business. Defendant operated entirely by mail between its home office in Kentucky and borrowers resident in other states, maintaining no employees or offices in California—in other words, a straight interstate

business. The California court rejected the argument of defendant, based upon the commerce clause, and buttressed by citation of the so-called "drummer" cases, *e.g., International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910); but see *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U. S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 (1961), that the state could not exact a license requirement from a foreign corporation doing purely interstate business with residents of that state. The court noted that the Small Loan Law of California "is legislation designed for the public welfare. 'It is primarily to protect the citizens of this state from fraudulent and unconscionable conduct of those in the lending business * * * and as such, is a matter of local concern * * *. The degree of regulation contained in the laws of this state with reference to loan sharks is not disproportionate to the evils which exist if the lenders are left to their own devices without licensing and without any regulation by the state" (47 Cal. Rptr., at p. 814); and "Fairfax should not be allowed to escape state regulation merely because it is also engaged in interstate commerce" (*id.*, at p. 815). Proper regulation of the business was thought to be impossible without the license requirement. *Ibid.*

Plaintiff and *amicus curiae* present us with an extended attack upon the soundness of the California opinion in *Fairfax Family Fund* but fail to deal with the tangible fact that the United States Supreme Court dismissed the loan company's appeal therefrom for want of a substantial federal question. A clue to the reasoning behind the short *per curiam* of the Supreme Court lies in the more extended discussion in the dissenting opinion of Mr. Justice Douglas. That emphasizes the "drummer" cases as representative of the there asserted view that "our decisions have

heretofore precluded a State from exacting a license of a firm doing an exclusively interstate business as a condition of entry into the State" (382 U. S., at p. 2, 86 S. Ct., at p. 34). The dissent also suggests the reliance of the appellee (and presumably of the court majority) on *Robertson* v. *People of State of California*, *supra*, 328 U. S. 440, 66 S. Ct. 1160, which we have shown above to have manifested a liberal and sympathetic view of state efforts at essential regulation of local incidents of interstate business as against criticism for interference with interstate commerce. In sum, we cannot but construe the dismissal in *Fairfax Family Fund* as strongly suggestive of the validity, in the context of a state statute regulating consumers' loan practices, of New Jersey's exaction from plaintiff of its qualification for a license, as well as of the application to it of the other regulatory provisions in The Secondary Mortgage Loan Act of 1965, insofar as commerce grounds are concerned.

The act is even-handed and non-discriminatory (after excision of *section* 3) in its application to all domestic and foreign corporations engaging in loan transactions within the statutory scope, as interpreted above. By reasonable construction of the act, necessitated by the due process clause, plaintiff need not give up its general office in Philadelphia but must maintain a branch office in New Jersey and there maintain records of its transactions involving secondary mortgages on New Jersey realty for inspection by the Commissioner. In this and the other regulations of the statute mentioned in the briefs there is no invidious discrimination against plaintiff either as a foreign corporation or as engaging in interstate commerce.

In view of the fact that the cases teach us that each species of business must be appraised separately in the light of its own local regulatory requirements and of the nature of its peculiar interstate ramifications, and having the benefit of the dismissal in *Fairfax Family Fund*, we need not tarry long in dealing with the other commerce cases cited by plaintiff and *amicus curiae*. These have to do with altogether different situations. They cite *Allgeyer* v. *State of Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897), which invalidated a Louisiana statute which penalized the entry by domestic corporations into agreements calling for execution out of the state of insurance contracts covering property in the state with companies not in compliance with the insurance laws of the state. First, the fact situation presented there was totally dissimilar from that here. Second, the decision has subsequently been questioned and confined in its application. See *Osborne* v. *Ozlin*, *supra*, 310 U. S., at p. 66, 60 S. Ct. 758, 84 L. Ed. 1074; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 318-319, 63 S. Ct. 602, 87 L. Ed. 777 (1943); *cf. Howell* v. *Rosecliff Realty Co., Inc.*, 52 N. J. 313, at 322-323 (1968) (sustaining local taxation of premiums on insurance written out of the state on property situated here).

Plaintiff also relies on a series of cases holding that a state may not require of a foreign corporation its taking steps to qualify to do business there as a condition of its right to sue there (generally, or on a contract made there) if it does no business in that state except of an exclusively interstate nature. See, typically, *International Text-Book Co.* v. *Pigg*, *supra*. But some of the cases in that field have exhibited considerable readiness to find the local

requirement valid where there was some semblance of local contacts by the foreign corporation apart from its purely interstate business. See *Union Brokerage Co.* v. *Jensen and Eli Lilly & Co.* v. *Sav On-Drugs*, both *supra*. It is apparent that entirely different local policy questions and regulatory problems are posed in the instant case, and that the sanctions imposed also vary markedly from those in the foreign corporation registration cases cited. Furthermore, there were here local contacts of importance which preceded and survived the loan transaction itself. There was a mortgage recorded in New Jersey on land situate therein and ordinarily enforceable only by legal action there. Payments on the loan were to emanate from a borrower resident in that state, exerting an effect on its economy, and, if excessive, possibly on its public resources. *Cf. Howell* v. *Rosecliff Realty Co., Inc., supra*, 52 N. J., at p. 327. And finally, plaintiff's penetration of the New Jersey borrowing market was, in this case, as rendered indisputable by the affidavits, accomplished through the intermediation of a broker operating here. For purposes of the preceding observations, it makes no difference whether or not that broker was, technically, an employee of plaintiff. *Cf. Howell* v. *Rosecliff Realty Co., Inc., supra*, at 326, 327.

In any event, as noted above, the dismissal for lack of a substantial federal question in the *Fairfax Family Fund* case, *supra*, in the face of the *International Text-Book* line of decisions just discussed and relied upon in the dissent in *Fairfax Family Fund*, establishes to our satisfaction that that line of authority does not require a holding here of unconstitutionality on commerce grounds.

In the light of the foregoing discussion, we also find entirely insubstantial the due process argument so far as it rests, as presented, on the circumstance that the loan documents were executed out of the State.

IX. Full Faith and Credit

Finally, plaintiff contends that refusal to apply Pennsylvania law to this transaction would violate the full faith and credit clause of the Constitution. We determined in VI, above, that the Legislature has, by clear implication, decreed that the Secondary Mortgage Loan Act of 1965 should apply to a loan transaction with these incidents whatever its freedom from violation of any law of the state where the papers were signed. But plaintiff says that for the New Jersey Legislature to so ordain violates the full faith and credit clause. We think well settled principles augur a contrary conclusion.

It is clear that the full faith and credit clause does not require a forum state to enforce a contract valid under nonforum law where enforcement would subvert the public policy of the forum state. See *Bradford Electrical Light Co., Inc.* v. *Clapper*, 286 U. S. 145, 160, 52 S. Ct. 571, 76 L. Ed. 1026 (1932); *Klaxon Company* v. *Stentor Electric Manufacturing Company*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Alaska Packers Ass'n.* v. *Industrial Accident Comm.*, 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

In the instant case, giving this transaction the protective umbrella of the Pennsylvania statute would not only offend New Jersey policy in a most sensitive area, but would negate a New Jersey statute embodying that policy in terms read above by this court to control the very

transaction involved. In *Casteel* v. *Casteel*, 45 N. J. Super. 338 (App. Div. 1957), we spoke to the issue as follows:

> "Every state is entitled to enforce in its own courts the policy of its own statutes on subjects properly the incidents of its jurisdiction, and the full faith and credit clause of the United States Constitution does not require otherwise unless the conflicting statute or judgment of another state is shown, on some rational basis, to have a superior basis for recognition. *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U. S. 532, 547, 548, 55 S. Ct. 518, 79 L. Ed. 1044 (1935)" (at p. 354).

The Pennsylvania statute does not have a claim for recognition to validate this transaction superior to that of the New Jersey statute for subjection of the transaction to its requirements. The freedom of plaintiff ordinarily to contract how and with whom it will does not rationally outweigh the decree of the New Jersey Legislature, born of the baneful background circumstances related above, that whoever, wheresoever resident, would lend to residents of New Jersey on the security of a secondary mortgage on property in that State must comply with the regulatory requisites it has laid down at peril of losing its right of recovery on such a loan in New Jersey courts.

We find the contention grounded on denial of full faith and credit to lack merit.[6]

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[6] Having disposed of the particular constitutional challenges raised herein, we note that the act has also recently been held free from invalidity on grounds of vagueness in various particulars. *Crescent Investments Co.* v. *Commissioner of Banking and Insurance*, 103 N. J. Super. 11 (Ch. Div. 1968).

X. Cancellation of the Mortgage

Pending argument of the appeal, plaintiff, on June 7, 1968, caused the mortgage it took from defendants to be cancelled and discharged of record, and we have granted its motion to add the evidence of that fact to the record. Plaintiff's position is that the discharge of the mortgage relieves the transaction of any coverage by the act. This contention is akin to one of the main grounds on which it prevailed below—that the note and mortgage are separate and distinct and that in an action on the note alone, as here, the taking of the mortgage and any legal incidents thereof are irrelevant to plaintiff's right of recovery thereon.

Both of the stated points miss the policy objective of the act. This was to *prevent the taking* of secondary mortgages on residences as security for a loan unless preceded and accompanied by compliance with the statutory regulations, and this for reasons sufficiently explained hereinabove. The legislative policy is prophylactic as well as curative. Only by the application of the stringent sanctions set forth in the act did the Legislature conceive that *entry into* such unauthorized transactions could be adequately deterred. To allow a lender to get by with the exaction of a secondary mortgage as security for a loan violative of the act, and to defeat the application of sanctions, when challenged, by *then* cancelling the mortgage, would be to defeat the effectiveness of the sanction as a deterrent.

XI. Violations Calling for Sanctions

Section 29 of the act reads:

> "No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the provisions of this act."

Defendants' position is that they were entitled to summary judgment under section 29 on the ground of a number of asserted violations of the act, some of which were the subject of factual dispute on the cross-motions for summary judgment and others not.

The asserted violations involving disputed issues of fact were:

(a) fraud and misrepresentation as to any mortgage being involved in the transaction; (b) being compelled to purchase insurance; (c) exaction by plaintiff's agent of an unauthorized brokerage fee through the enforced purchase of a television set.

If the case for plaintiff's violation of the act depended upon any of the foregoing, the matter would have to be remanded for trial of the factual issues. In view of our conclusion as to the effect of some of the undisputed violations, this will be unnecessary.[7]

The asserted undisputed failure to obtain a license; violations of the Act itself are: (a) the plaintiff's; (b)

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[7] Ground (a) depends on whether the sanction of nonenforcement can be applied to a statutory ground for suspension or revocation of a license under *section* 11, such as commission of any fraud, engaging in any dishonest activities or misrepresentation, as distinguished from any absolutely prohibited act. We need not decide the question.

exaction of excessive interest; (c) inclusion in the note of a power of attorney to confess judgment.

Defendants also project violation by plaintiff of the Commissioner's regulation 5(d), requiring the lender to give the borrower notice in writing of his right to independent counsel before signing the papers. There is no dispute that no such notice was given. As to this contention, however, we seriously doubt that a sanction as heavy as preclusion of the right to sue to recover any part of the loan is applicable to violation of a regulation of the Commissioner as distinguished from violation of the act. The pertinent section (29) speaks only in terms of failure of "compliance with the provisions of this act." Elsewhere in the statute, by contrast, there is reference to violation of "this act or any rules or regulations promulgated pursuant thereto." *Section* 14. See also *section* 11(c).

Nor could we, in the circumstances here presented, forfeit plaintiff's entire chose in action for failure to have obtained a license. Under *section* 3 it would have been futile for plaintiff to have applied for a license, as it did not qualify thereunder. To date there has been no *reported* decision at all, delaring the section invalid. It would be grossly unfair, therefore, to penalize plaintiff by depriving it of its right of action on the note on this ground. However, all "persons" (as defined in the act, *section* 1(*b*)) engaging in transactions covered by the act henceforth are herewith put on notice that the licensing provisions as well as all other valid provisions of the act and regulations are applicable to them.

The remaining undisputed violations of the act—taking of excessive interest and incorporating in the note

a power of attorney to confess judgment—will necessarily require the sanction of *section* 29 to be imposed. The fact that plaintiff did not act on the power of attorney to confess judgment is of no more consequence than its voluntary cancellation of the mortgage, and for the same reasons as stated above in that regard. The note may therefore not be the subject of an action to recover thereon in the courts of this State.

The judgment is reversed and the cause remanded for entry of final judgment in favor of defendants.

APPENDIX D

Supplemental Opinion, Superior Court of New Jersey, Appellate Division

Oxford Consumer Discount Company of North Philadelphia v. *Stefanelli, et al.* (filed February 24, 1969)

Conford, S. J. A. D. On September 11, 1968 this court held the Secondary Mortgage Loan Act of 1965 (N.J.S.A. 17:11A-1 *et seq.*; L. 1965, c. 91) to be, in the main, a valid enactment, constitutionally applicable in relation to the enforcement of the obligation on a secondary mortgage loan to New Jersey borrowers, secured by real property situated in this State, although the loan agreement was executed in Pennsylvania and the loan repayable in that state to a lender which was a Pennsylvania corporation carrying on a loan business in that state under authority of a licensing statute there in effect. *Oxford Consumer Dis. Co. of No. Phila.* v. *Stefanelli*, 102 N. J. Super. 549. We consequently barred recovery by plaintiff lender of any part of the loan or interest due thereon, finding that the loan agreement called for interest in excess of that allowed by the New Jersey act and was violative of the act in one other respect. We acted under the mandate of *section* 29 of the act, which provides that no obligation arising out of a secondary mortgage loan (as defined by the act) shall be enforceable in the courts of this State unless negotiated and made in full compliance with the provisions of the act. Certain other allegations by defendants as to violations of the act were not passed upon, as they involved disputes of fact which had not been duly tried.

Thereafter, we denied an application by the plaintiff for rehearing. At the same time, however, we granted a petition of First Mercantile Consumer Discounts Company ("First Mercantile"), another Pennsylvania small loan

company, for leave to intervene in the cause for the purpose of permitting it to be heard to contend on petition for rehearing that the September 11, 1968 decision of the court should be held not to have retroactive effect as to loan transactions entered into before the effective date of that decision by Pennsylvania corporations licensed in the State of Pennsylvania to make such loans, where the loans were not only made there but were also repayable there and in all other respects in conformity with Pennsylvania law.

We allowed the intervention, although such action on appeal is quite rare and granted only in extraordinary circumstances—see *Hurd v. Illinois Bell Telephone Company*, 234 F. 2d 942, 944 (7 Cir. 1956); *McKenna v. Pan American Petroleum Corporation*, 303 F. 2d 778, 779 (5 Cir. 1962)—on the basis of the following showing.

First Mercantile and another Pennsylvania loan company had been sued by certain of their New Jersey borrowers, prosecuting a class action in the Chancery Division, for an injunction to restrain enforcement of all secondary mortgage loans made on the security of New Jersey realty by such corporations, although the loan agreements of plaintiffs in those actions were all executed and provided to be repaid in Pennsylvania. Pending the appeal in the instant case we had granted First Mercantile leave to appeal an order of the Chancery Division permitting the continued prosecution of the suit as a class action.

First Mercantile filed proofs on its petition for intervention in the present case, showing it had made secondary mortgage loans secured by New Jersey realty amounting to approximately $5.5 million, all of which would be uncollectible if our decision of September 11, 1968 were

applied retrospectively; that such a result would be catastrophic, causing insolvency of First Mercantile's parent corporation, throwing 50 of its employees out of work, and jeopardizing loans of about $8 million to these corporations made by various banks, insurance companies and other lenders; that unless an early judicial declaration as to the inapplicability of the decision retrospectively to Pennsylvania lenders in First Mercantile's position were forthcoming, its many New Jersey borrowers would repudiate their obligations and cause ruin to the company; and that it had made loans on secondary mortgages on New Jersey realty, notwithstanding enactment of the New Jersey act in 1965, on the basis of advice of both Pennsylvania and New Jersey counsel that these loans were Pennsylvania transactions subject to Pennsylvania law and not subject to the Secondary Mortgage Loan Act of 1965 or any other New Jersey law.

Upon inquiry by the court, *amicus curiae* Middle Atlantic Finance Association advises that nine of its Pennsylvania members had made out-of-state secondary mortgage loans secured by New Jersey real estate, prior to September 11, 1968, aggregating $4,460,881.96 (not inclusive of loans by First Mercantile but including loans by plaintiff). An undeterminable additional amount of such loans has been made by other Pennsylvania members of that organization.

In addition to the original parties and *amicus*, Paul V. Durkin and Ellen Durkin, plaintiffs in the aforementioned pending class action against First Mercantile, have been admitted herein as *amici curiae* to file a brief and to argue in opposition to the position of that intervenor. Plaintiff supports the position of intervenor, having considerable

stake in the issue by virtue of other loans outstanding affected by our September 11, 1968 decision. However, as noted, we have already denied its petition for rehearing of this case in relation to the effect of the decision in relieving the Stefanelli defendants of liability, taking the view that the latter are entitled to retain the fruits of their victory regardless of our conclusion as to the pending request for restrictive application of the decision to other loans. See *Goldberg* v. *Traver*, 52 N. J. 344, 347 (1968). The Stefanellis nevertheless join the Attorney General and the Durkins in opposition to the position of the intervenor.

The proponents of intervenor's position rest their basic argument on the alleged unfairness and injustice of applying the September 11, 1968 holding to loans made prior thereto so as to wipe out all their equity in these loans, but they concede[1] that they should justly be confined to recovery of the principal sums and to such interest and other charges (so far as agreed to in the loan transaction) which do not exceed the maximum permitted by New Jersey or Pennsylvania law, whichever is lower. *Cf. Ditmars* v. *Camden Trust Co.*, 10 N. J. 471, 494-98 (1952). The Attorney General adamantly opposes judicial extension of any consideration to intervenor and contends for literal application of section 29 of the act, barring any recovery at all on secondary mortgage loans violative of the act in any respect, whenever made. He takes the position that the public policy declared by the Legislature should not be modified to any degree because the principle

[1] Subject to their reserved right to challenge the entire decision on its merits on appeal to the New Jersey Supreme Court.

of prospective application of judicial decisions is not properly invocable in the existing circumstances.

Intervenor and plaintiff contend that they reasonably relied, after adoption of the act in 1965, upon what they urge was the then generally held view that loans made in a particular state by a lender organized in that state, to be repayable there, were governed as to validity by the law of that state, even if secured by lien on real estate situated elsewhere. That general principle enjoys some color of support in *Proposed Official Draft of the Restatement, Conflict of Laws* (1968), § 195, "Contracts for Repayment of Money Lent," comment (a). (This section and comment are also found in earlier drafts.) The contention is, further, that the reliance by this court in its decision of September 11, 1968, on § 6 (1) of the 1967 *Restatement* draft, as to the controlling effect of a direction as to a choice of a law contained in a statute of the forum, was novel and surprising in that there is no express provision in the New Jersey act as to choice of law and in that this court found an implied direction in the act for control of the questioned transaction by the provisions of the act—an implication which intervenor's advisers should not be blamed for not having also drawn from the act. See 102 N. J. Super. at pp. 563-564. It is argued that average, competent counsel would not have predicted this court's decision on the choice of law question but rather would have concluded that Pennsylvania law controlled as to the validity of the loan in the circumstances presented.

It is further maintained by the supporters of the intervenor's position that none of the Pennsylvania corporate lenders could have complied with the requirement of section 3 of the act that holders of at least 50% of the stock

in corporate applicants for lending licenses should have been residents of New Jersey for two years prior to the application. Although we held that provision of the act unconstitutional (and severable from the remainder) (102 N. J. Super., at pp. 560-562), it is argued that the existence of the requirement in the act as passed nevertheless contributed to the reasonable overall impression of Pennsylvania corporate lenders not owned to the extent of 50% by New Jersey residents, and thus not capable of qualifying as licensees under the act, that they would surely not be held to come under the confiscatory sanctions of the act as to loans made and repayable in Pennsylvania although secured by secondary mortgages on New Jersey realty.

Finally, although the point is not made in any of the briefs on the intervenor's side, there was discussion at the oral argument as to whether there was some element of surprise or novelty in the determination of this court in the September 11, 1968 decision that application of the statute to such transactions as are here involved did not offend the Commerce Clause of the Federal Constitution, in view of the court's substantial reliance in that regard on the 1965 dismissal for want of federal jurisdiction of the appeal in *Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1, 86 S. Ct. 34, 15 L. Ed. 2d 6 (1965) (102 N. J. Super., at pp. 570-572), and in further view of the general constitutional prohibition of local state licensing requirements in relation to exclusively interstate transactions. See *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U. S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 (1961).

There is no question but that appellate courts in this State and elsewhere have long regarded themselves

as empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application if considerations of fairness and justice, related to reasonable surprise and prejudice to those affected, seemed to call for such treatment. *Great Northern R. Co.*, v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932); *State* v. *Johnson*, 43 N. J. 572, 582-583 (1965), affirmed *sub nom. Johnson* v. *New Jersey*, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966); *Goldberg* v. *Traver*, 52 N. J. 344 (1968); *Irwin* v. *Irwin*, 443 P. 2d 931 (Okl. Sup. Ct. 1965); *Johson* v. *Stoveken*, 52 N. J. Super. 460 (App. Div. 1958); *State* v. *Koonce*, 89 N. J. Super. 169, 185 (App. Div. 1965). The decision in *Wangler* v. *Harvey*, 41 N. J. 277 (1963), illustrates the variations in viewpoint reasonably entertainable by different judges as to whether justifiable reliance on a previous notion of the law could be found in reference to a particular case of judicial reformulation of the law (the majority of the court held there was no justifiable prior reliance).

While most of the decided cases on prospective effect concern decisions expressly overruling previous holdings and announcing explicit changes in the law, see Levy, "Realist Jurisprudence and Prospective Overruling," 109 U. Pa. L. Rev. 1 (1960), *passim*, the practice is not limited to such cases but may also apply to situations where a court renders a first-instance or clarifying decision in a murky or uncertain area of the law but under circumstances where members of the public or public entities could be found to have previously, and not unreasonably relied on a different conception of the state of the law. See *Goldberg* v. *Traver*, *supra* (52 N. J., at pp. 346-347); *Irwin* v. *Irwin*, *supra* (433 P. 2d, at p. 934);

Coffey v. *Anderson*, 371 S. W. 2d 624, 626 (Ky. Ct. App. 1963); *Nani* v. *Zoning Board of Review of Town of Smithfield*, 242 A. 2d 403 (R. I. Sup. Ct. 1968). It is noteworthy that in all of the first three of the last-cited cases the new determination of the state of the law, held applicable only prospectively, involved matters of statutory construction. This suffices to refute any notion that the doctrine of prospective effect is necessarily inapplicable to determinations of statutory or constitutional construction as distinguished from those of common law.

We thus turn to considerations of whether members of the public in the position of First Mercantile, that is to say, Pennsylvania corporations making loans in Pennsylvania, repayable there, and complying in all respects with applicable Pennsylvania regulatory statutes, but secured by secondary mortgages on New Jersey realty, will be unfairly and unjustly treated if such loans, made prior to the effective date of our September 11, 1968 decision, are rendered totally uncollectible in this State by virtue of that decision.

The Attorney General points to certain evidence, collected *ex parte* and set forth in his appendix, tending to show that principles in the plaintiff corporation and First Mercantile, or in associated corporations, were active in inquiries of the New Jersey Department of Banking and Insurance concerning the reach of the act shortly after its adoption. The president of First Mercantile, appearing on behalf of a New Jersey corporation, attended a hearing relating to adoption of proposed rules and regulations of the Department implementing the act, one of which, Rule 1, declared that notwithstanding the place of execution of a secondary mortgage loan, it would be deemed subject to the act if the real property is located

in this State (a rule held invalid in the September 11, 1968 decision, 102 N. J. Super., at p. 564).

The Attorney General further shows that a Pennsylvania finance association lawyer testified at the departmental hearing in opposition to the residency requirements in *section* 3; also that an officer of a company associated with the present plaintiff corporation inquired as to the effect of the act as against Pennsylvania licensed discount companies, and was sent a response calling attention to Rule 1 and various sections of the act, including *section* 29. On December 6, 1965 a corporation associated with the present plaintiff and a Pennsylvania association of finance companies, of which the parent corporation of First Mercantile was a member, sued the Commissioner of Banking and Insurance in the Chancery Division to enjoin enforcement of a number of provisions of the act (but not Rule 1), and on March 17, 1966 judgment was entered in that action holding *section* 3 to be unconstitutional. It is also shown that New Jersey corporations associated, respectively, with First Mercantile and plaintiff, obtained licenses under the act, and that one of them has made some New Jersey loans pursuant thereto.

We regard the foregoing data as of rather limited significance in relation to the issue before us. It evidences at most that certain of the Pennsylvania small loan interests were conscious of and concerned about the possible effect of the New Jersey act upon loans they might make in Pennsylvania secured by secondary mortgages on New Jersey realty. But this does not necessarily manifest that they were unreasonable in relying upon legal advice that if made in Pennsylvania, and re-

payable there, the loans would be governed as to legality solely by the law of Pennsylvania, in which state the lending corporations were organized and licensed to make such loans. See 102 N. J. Super., at p. 559. The intervenor agrees with the Attorney General that, in principle, the existence of reliance by laymen on prior law should be judged by what "competent legal counsel" would have advised. We would add the qualification, "legal counsel of average competence."

It is difficult for a court which has examined at length into the merits of the conflict of laws and interstate commerce questions and formulated conclusions thereon, as we did in the September 11, 1968 decision, now retrospectively to hypothesize the advice that counsel of average legal competence would have given the Pennsylvania companies as to their right to enter into these transactions free from imperilment of their investment because of the 1965 New Jersey statute. But we think that in arriving at an ultimate decision herein we should weigh the probabilities in relation to the foregoing factor in the light of the magnitude of the potential losses of the lenders as compared with the amount of gains to individual borrowers consequent upon a rejection of the doctrine of prospective application in this case.

Applying that approach, we have concluded that on the basis of the showing of the intervenor and plaintiff, overall considerations of fairness and justice call for some degree of restriction of retroactive application of our September 11, 1968 decision in relation to loans by licensed Pennsylvania lenders made prior to the effective date thereof, where the loans comported with the regulatory Pennsylvania law, the agreements were exe-

cuted in that state, and the obligations were repayable there. We are satisfied that there could be said to have been sufficient doubt in advance of our decision that the New Jersey act applied to such loans, whether constitutionally, with relation to choice of law, or otherwise, especially as to lending corporations having less than 50% of shareholders resident in New Jersey, that, weighed against the potential catastrophic effect thereof on some of such lenders, unrestricted retroactive operation of the decision should be disallowed.

The question remains as to precisely what restrictions on retroactivity should be imposed.

We have concluded that we should not now go beyond adjudicating relief from retroactivity in respect of transactions where there was no intermediation of any kind by others, operating in this State, between Pennsylvania lender and New Jersey borrower.

We are clear, first, that Pennsylvania lenders obtaining New Jersey loan business on a regular, continuing basis by or through agents, brokers, or representatives operating in this State, whether or not technically independent contractors, could not reasonably have been advised in advance that choice of law and interstate commerce factors would immunize the loans from the effect of the New Jersey act. As to such loans, therefore, the decision of September 11, 1968 will remain fully retroactive. As to any other type of case involving some degree of causal intermediation between the lender and the borrower by operatives functioning in this State, the court should appraise the particular facts of the individual case for determination as to whether considerations of fairness and justice call for relief from retro-

activity of the September 11, 1968 decision in such instance, according to the criteria discussed above.

It is next necessary to decide whether there should be any curtailment of the lender's claim to interest and other charges where it ultimately qualifies otherwise for relief from retroactivity. As heretofore noted, plaintiff and intervenors contend that fairness would be served by requiring the borrowers to pay the interest rates and other charges (if specifically agreed to in the loan contract) allowed for such transactions by either the New Jersey or Pennsylvania statute, whichever is the lower. We think some further curtailment of recoverable interest is appropriate in order to give a degree of substantial effect to the circumstance that, in finality, the lenders have violated New Jersey law as substantively determined by our prior decision. Therefore recovery will be limited to 6% per annum simple interest computed on principal balances outstanding on funds actually advanced.

In relation to other loan charges, in view of the fact that, by and large, aggregate allowable charges to borrowers are heavier under the New Jersey statute than that of Pennsylvania (102 N. J. Super., at pp. 556, 560), we regard it as fair to allow the lender to retain any charges contracted for which are allowable under the Pennsylvania statute.

The opinion of the court heretofore rendered in the cause is to be taken as supplemented by this determination on the petition for rehearing of the intervenor.

APPENDIX E

Opinion of Superior Court of New Jersey, Law Division, Essex County

Oxford Consumer Discount Company of North Philadelphia v. *Stefanelli* (Judgment filed November 3, 1967)

Plaintiff is a Pennsylvania Corporation, a licensed consumer discount company in that state. The defendant is a resident of New Jersey.

From the affidavits the following facts appear:

The defendants went to Philadelphia, Pennsylvania, and there entered into a loan transaction with the plaintiff. The defendant on June 6, 1966 at Philadelphia, Pennsylvania, entered into a loan transaction with the plaintiff at which time he executed a promissory note for $4,535.28 and executed in Pennsylvania a second mortgage on property located in New Jersey to secure the note. The entire transaction was executed in Pennsylvania and in accordance with Pennsylvania law.

Defendant contends he did not know this was a secondary mortgage transaction, that he was led to the plaintiff's place of business by Sidney Padhill to whom he paid a brokerage fee by the purchase of a T.V. set.

Plaintiff and defendant now move for summary judgments.

In an action on a promissory note, secured by a mortgage on property located in New Jersey the law of Pennsylvania determines the validity of the note. *Buzzone* v. *Hartford Accident and Indem. Co.*, 23 N. J. 447 (1957) p. 452.

The New Jersey Secondary Mortgage Loan Act of 1965 has no application to plaintiff's suit on the note.

Opinion of Superior Court of New Jersey, Law Division, Essex County

Plaintiff's motion for summary judgment on the note in the sum of $5,071.82 is granted.

A judgment recovered upon a debt secured by a mortgage does not merge with the mortgage nor operate as a discharge, abandon or release of the mortgage security. *Silver* v. *Williams*, 79 N. J. Super. 456, 462 (Ch. Div. 1961).

The law of New Jersey controlls the validity of the mortgage but does not in any way affect the plaintiff's right to execute on defendant's real estate to satisfy the judgment herein granted.

Defendant's motion for summary judgment is denied.

Plaintiff's attorney will submit appropriate order consented to as to form by defendant's attorney.

APPENDIX F

New Jersey Secondary Mortgage Loan Act of 1965. L. 1965; c. 91, §1 *et seq.* N.J.S.A. 17:11A-1 *et seq.*

17:11A-1. DEFINITIONS

In this act, unless the context otherwise requires, the following words shall have the following meanings:

a. "Secondary mortgage loan" means (1) a loan made to an individual or partnership not to be repaid in 90 days or less which is secured in whole or in part by a mortgage upon any interest in real property used as a dwelling with accommodations for not more than 4 families, which property is subject to the lien of one or more prior mortgages or (2) the purchase of any interest in an existing mortgage made to secure such a loan.

b. "Person" means an individual, corporation, partnership or any other group of individuals however organized, but does not include any banking institution, savings bank, association subject to chapter 144 of the laws of 1963,[1] Federal savings and loan association, insurance company or any other financial institution which is subject to any other law of this State or of the United States regulating the power of such institution to engage in mortgage loan transactions.

c. "Licensee" means any person duly licensed by the commissioner pursuant to this act.

d. "Commissioner" means the Commissioner of Banking and Insurance of New Jersey.

e. "Payment period" means the period of time scheduled by the terms of a secondary mortgage loan to elapse

[1] Section 17:12B-1 et seq.

between the days upon which installment payments are required to be made on such loan.

f. "Net proceeds" means the difference between the full amount of a secondary mortgage loan and the amount of interest taken in advance upon such loan pursuant to this act. L. 1965, c. 91, § 1.

17:11A-2. NECESSITY FOR LICENSE

No person shall make or negotiate, or offer to make or negotiate, any secondary mortgage loan in the regular course of business unless he or his broker, agent or other representative shall have first obtained a license from the commissioner as provided for by this act. A person shall not be deemed to be acting in the regular course of business if he makes or negotiates not more than 2 secondary mortgage loans in a calendar year. L. 1965, c. 91, § 2.

17:11A-3. RESIDENCE REQUIREMENTS

Every applicant for a license under this act shall have been a bona fide resident of this State for a period of at least 2 years prior to the date of filing the application for such license. In the case of a corporate applicant, the holder or holders of at least 50% of the stock of such corporation shall have resided in this State for a period of at least 2 years prior to the date of filing the application. L. 1965, c. 91, § 3.

17:11A-4. APPLICATION FOR LICENSE; FORM; CONTENTS

(a) Application for a license under this act shall be in writing, under oath, and shall be in the form prescribed by the commissioner.

(b) The application shall state the name and residence and business addresses of the applicant, and if the applicant is a copartnership or association, of every member thereof, and if a corporation, of each officer, director and stockholder thereof. It shall also state the address where the business is to be conducted and any other information the commissioner may require. L. 1965, c. 91, § 4.

17:11A-5. ACTION BY COMMISSIONER ON APPLICATION

Within 60 days after the filing of the application and the payment of the fees hereinafter set forth the commissioner shall either:

(a) Issue and deliver to the applicant a license to engage in the business of making or negotiating secondary mortgage loans in accordance with the provisions of this act at the location specified in the said application; or

(b) Refuse to issue the license for any reason for which the commissioner may suspend, revoke or refuse to renew any license under section 11 of this act.[1] L. 1965, c. 91, § 5.

17:11A-6. DUTIES OF COMMISSIONER UPON DENIAL OF LICENSE

If the commissioner refuses to issue a license he shall:

(a) Notify the applicant of the denial and of his right to request a hearing within 10 days.

(b) If the applicant does not request a hearing, return the sum paid as a license fee.

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[1] Section 17:11A-11.

(c) If the applicant requests such a hearing, give notice of the grounds for refusal and hold a hearing thereon. Within 30 days thereafter the commissioner shall file a written decision containing his findings and conclusions and serve a copy thereof upon the applicant. L. 1965, c. 91, § 6.

17:11A-7. LICENSE; NAME AND LOCATION; TRANSFERABILITY

(a) Each license shall specify the location of the office or branch and must be conspicuously displayed therein. In case such location be changed, the commissioner shall indorse the change of location on the license without charge.

(b) Such license shall not be transferable or assignable.

(c) No licensee shall transact the business provided for by this act under any other name or maintain an office at any other location than that designated in the license. L. 1965, c. 91 § 7.

17:11A-8. LICENSE FEE; RENEWAL

Every licensee shall pay to the commissioner at the time of making the application and annually thereafter upon renewal a license fee of $25.00. L. 1965, c. 91, § 8.

17:11A-9. BOND; FORM; CONDITIONS; LIABILITY

Every licensee shall file with the commissioner a corporate surety bond in the principal sum of $5,000.00. Such bond shall be in form satisfactory to the commissioner and shall be issued by a surety company authorized to transact business in this State. The bond shall run to the State and shall be conditioned that the licensee will

comply with the provisions of this act. The aggregate liability of the surety on the bond shall in no event exceed the amount of such bond. L. 1965, c. 91, § 9.

17:11A-10. ABATEMENT IN AMOUNT OF LICENSE FEE; EXPIRATION OF LICENSE

No abatement in the amount of said license fee shall be made if the license is issued for less than 1 year, nor if the license is surrendered, canceled or revoked prior to the expiration of the period for which such license was issued. Every license shall expire on December 31 of each year. L. 1965, c. 91, § 10.

17:11A-11. SUSPENSION, REVOCATION OR REFUSAL TO RENEW LICENSE; NOTICE; HEARING; FINDINGS BY COMMISSIONER

The commissioner may suspend, revoke or refuse to renew any license issued hereunder, upon 10 days' notice in writing, forwarded by registered or certified mail to the principal place of business of such licensee, stating the contemplated action and in general the grounds therefor, and after reasonable opportunity to be heard, if he shall find that the licensee or any owner, director, officer, member, partner, stockholder, employee or agent of such licensee has:

(a) made any material misstatement in the application;

(b) committed any fraud, engaged in any dishonest activities, or misrepresented or failed to disclose any of the material particulars of any secondary mortgage loan transaction to any one entitled to such information;

(c) violated any of the provisions of this act or of any rule or regulation promulgated pursuant thereto;

(d) otherwise demonstrated unworthiness, bad faith, dishonesty or any other quality indicating that the business of the licensee has not been or will not be conducted honestly, fairly, equitably and efficiently within the purposes and intent of this act. L. 1965, c. 91 § 11.

17:11A-12. SURRENDER OF LICENSE; EFFECT UPON LIABILITY

Any licensee may surrender his license by delivering the license to the commissioner with written notice that he thereby surrenders the license, but such surrender shall not affect the licensee's civil or criminal liability for acts committed prior to the surrender. L. 1965, c. 91, § 12.

17:11A-13. REINSTATEMENT OF SUSPENDED LICENSE; ISSUANCE OF NEW LICENSE AFTER REVOCATION

Every license issued hereunder shall remain in force and effect until the same shall have expired or been surrendered, revoked or suspended in accordance with the provisions of this act, but the commissioner may reinstate suspended licenses or issue new licenses to a licensee whose license or licenses have been revoked, if the conditions under which such licenses were revoked have been corrected and the commissioner is satisfied as the result of an investigation that such conditions are not likely to recur. L. 1965, c. 91, § 13.

17:11A-14. INVESTIGATIONS BY COMMISSIONER; EXAMINATION OF BOOKS, RECORDS AND ACCOUNTS

The commissioner, if he has reasonable cause to believe that any licensee, or any other person, has violated any

of the provisions of this act or of any rules or regulations promulgated pursuant thereto, shall have the power to make such investigations as it shall deem necessary, and may examine the books, accounts, records and files of such licensee or any other such person believed to have violated this act or any rules or regulations promulgated pursuant thereto. L. 1965, c. 91, § 14.

17:11A-15. ISSUANCE OF SUBPOENAS; ADMINISTRATION OF OATHS AND AFFIRMATIONS BY COMMISSIONER

The commissioner shall have power to issue subpoenas to compel the attendance of witnesses and the production of documents, papers, books, records and other evidence before him in any matter over which he has jurisdiction, control or supervision. The commissioner shall have the power to administer oaths and affirmations to any person whose testimony is required. L. 1965, c. 91, § 15.

17:11A-16. FAILURE TO COMPLY WITH SUBPOENA; COURT ORDER; CONTEMPT

In case of a failure of any person to comply with any subpoena issued by the commissioner or to testify with respect to any matter concerning which he may be lawfully interrogated, the Superior Court, on application of the commissioner, may issue an order requiring the attendance of such person and the giving of testimony or production of evidence. Any person failing to obey the court's order may be punished by the court as for contempt. L. 1965, c. 91, § 16.

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

17:11A-17. MAINTENANCE OF BOOKS, RECORDS AND ACCOUNTS

Every licensee shall maintain at its place or places of business in this State such books, accounts and records relating to all transactions within this act as will enable the commissioner to enforce full compliance with the provisions of this act. L. 1965, c. 91, § 17.

17:11A-18. PRESERVATION OF BOOKS, RECORDS AND ACCOUNTS

All books, accounts and records of the licensee shall be preserved and kept available as provided herein for such period of time as the commissioner may by regulation require. L. 1965, c. 91, § 18.

17:11A-19. INFORMATION REQUIRED TO BE SHOWN IN BOOKS, RECORDS AND ACCOUNTS

The commissioner is hereby authorized to prescribe the minimum information to be shown in such books, accounts and records of the licensee so that such records will enable the commissioner to determine compliance with the provisions of this act. L. 1965, c. 91, § 19.

17:11A-20. COMPLIANCE OF LOAN WITH TERMS AND CONDITIONS OF ACT

No licensee shall make or offer to make any secondary mortgage loan except on the terms and conditions authorized by this act. L. 1965, c. 91, § 20.

17:11A-21. AMOUNT OF LOAN

A licensee may make a secondary mortgage loan in such an amount that the net proceeds thereof shall equal a predetermined sum, and may take interest in advance

upon the full amount of such loan for the period from the making of the loan to the date of maturity of the final installment. The full amount of such loan shall not exceed the aggregate of net proceeds and the amount of interest which may be taken in advance, as determined by the application of the formula,

$$I = \frac{.14\ A\ (P+1)}{2N}$$

in which "I" represents the amount of interest which may be taken in advance; "A" represents the amount of the predetermined net proceeds; "P" represents the number of payment periods contained in the period from the date of the making of the loan to and including the date of maturity of the final installment; and "N" represents, to the nearest whole number, the number of payment periods contained in a calendar year. L. 1965, c. 91, § 21.

17:11A-22. SCHEDULE OF MAXIMUM CHARGES

(a) The following is hereby fixed as the schedule of maximum amounts which may be charged to an applicant for a secondary mortgage loan for costs, fees, services, points and premiums which may be incurred by such applicant in connection with a secondary mortgage loan:

1. Appraisal and inspection fee of $50.00 per parcel or tract of land to be mortgaged.

2. Credit investigation of borrower—$15.00.

3. Search fee of $50.00 per parcel or tract of land to be mortgaged.

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

4. Legal fees, including preparation of all documents—5% of the full amount of the mortgage loan, not to exceed the sum of $200.00.

5. Recording and filing fees not to exceed $5.00 per document.

(b) The borrowers shall not be required to pay and commissions, finder's fees or points for the obtaining, procuring or placing of a secondary mortgage loan and such commissions, finder's fees or points, if any, shall be paid by the licensee and only to licensed real estate brokers, attorneys at law of the State of New Jersey or licensees under this act. Any agreement for the payment of such commissions, finder's fees or points, to be enforceable in the courts of this State, shall be in writing, signed by the licensee.

(c) The borrower shall not be compelled to purchase from the licensee fire, life or title insurance policies in connection with a secondary mortgage loan. L. 1965, c. 91, § 22.

17:11A-23. Prohibited provisions

No instrument evidencing or securing a secondary mortgage loan shall contain:

(a) any acceleration clause under which any part or all of the unpaid balance of the obligation not yet matured may be declared due and payable because the holder deems himself to be insecure;

(b) any power of attorney to confess judgment or any other power of attorney;

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

(c) any provision whereby the debtor waives any rights accruing to him under the provisions of this act or of any other law;

(d) any requirement that more than one installment be payable in any one installment period, or that the amount of any installment be greater or less than that of any other installment, except for the final installment which may be in a lesser amount;

(e) any assignment of or order for the payment of any salary, wages, commissions, or other compensation for services, or any part thereof, earned or to be earned. L. 1965, c. 91, § 23.

17:11A-24. STATEMENT OF BORROWER'S ACCOUNT

Upon written request from the borrower the holder of a secondary mortgage loan instrument shall deliver to the borrower within 10 days from a receipt of the written request a statement of the borrower's account showing the date and amount of all payments made or credited to the account and the total unpaid balance. Not more than 2 such statements shall be required in any 12-month period. L. 1965, c. 91, § 24.

17:11A-25. PAYMENT BEFORE MATURITY; REFUND CREDIT

Any borrower may satisfy in full at any time before maturity the amount of any balance due on any secondary mortgage obligation, and in so satisfying any such debt shall receive a refund credit on account of the interest in advance. L. 1965, c. 91, § 25.

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

17:11A-26. REFUSAL OF EXISTING MORTGAGE HOLDERS TO MAKE LOAN

No licensee shall make or negotiate any secondary mortgage loan unless it shall appear, from satisfactory evidence furnished by the applicant, that the holder of every existing mortgage upon the property offered as security for the secondary mortgage loan, other than the licensee, has declined to make a loan in the desired amount on the security of another mortgage upon such property. L. 1965, c. 91, § 26.

17:11-27. FALSE OR MISLEADING ADVERTISING

It shall be unlawful for any person to cause to be placed before the public in this State, directly or indirectly, any false or misleading advertising matter pertaining to secondary mortgage loans or the availability thereof; provided, however, that this section shall not apply to the owner, publisher, operator or employees of any publication or radio or television station which disseminates such advertising matter without knowledge of the false or misleading character thereof. L. 1965, c. 91, § 27.

17:11A-28. VIOLATIONS; PENALTIES

Any person who shall knowingly violate any provision of this act or shall directly or indirectly counsel, aid or abet such violation shall be liable, in addition to all other penalties and forfeitures imposed by this act or by any other law, to a penalty of not more than $1,000.00 for each offense.

Such penalty shall be sued for and recovered by and in the name of the commissioner and shall be collected

and enforced by summary proceedings pursuant to the Penalty Enforcement Law (N.J.S. 2A:58-1 et seq.). L. 1965, c. 91, § 28.

17:11A-29. Enforceability of loans in state courts

No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the provisions of this act. L. 1965, c. 91, § 29.

17:11A-30. Rules and regulations

The commissioner is hereby authorized and empowered to make, alter, amend and repeal such rules and regulations as shall be necessary to the establishment and maintenance of a standard of fair, equitable and honest conduct in the transaction of secondary mortgage loans. L. 1965, c. 91, § 30.

17:11A-31. Effect of act upon existing financial institutions

Nothing contained in this act shall be deemed to have any effect whatever upon the existing powers of any banking institution, savings bank, association subject to the provisions of chapter 144 of the laws of 1963,[1] Federal savings and loan association, or insurance company or other financial institution which is subject to any other law of this State or the United States regulating the power of such institution to engage in mortgage loan transactions, or upon the conditions and limitations imposed by any such law upon the exercise of such powers. L. 1965, c. 91, § 31.

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[1] Section 17:12B-1 et seq.

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

17:11A-32. SHORT TITLE

This act shall be known and may be cited as "The Secondary Mortgage Loan Act of 1965." L. 1965, c. 91, § 32.

17:11A-33. EFFECTIVE DATE

This act shall take effect on the ninetieth day next following the enactment thereof and shall be applicable to all secondary mortgage loans which have been entered into or made on or after said date. L. 1965, c. 91, § 33.

APPENDIX G

Pennsylvania Consumer Discount Company Act P. L. 262 §1 et seq. 7 *Purdon's Penn. Stat. Ann.* §6201, et seq.

§ 6201. SHORT TITLE

This act shall be known, and may be cited, as the "Consumer Discount Company Act." 1937, April 8, P.L. 262, § 1.

§ 6202. DEFINITIONS

The following terms shall be construed in the act to have the following meanings, except in those instances where the context clearly indicates otherwise:

"Person" includes an individual, partnership, association, business corporation, nonprofit corporation, common law trust, joint-stock company or any other group of individuals however organized.

"Contract" means a promissory or judgment note, bill of exchange, judgment, mortgage, conditional sales, contract, lease or bailment by which the lessee or bailee has the option of becoming or is bound to become the owner of real or personal property upon full compliance with the terms of the agreement, or any other form of negotiable or nonnegotiable instrument evidencing an agreement to pay a sum certain in money at a fixed or determinable time, either by a single payment or by stated installments.

"Applicant" means a corporation applying for a license under the provisions of this act.

"Licensee" means a corporation holding a license issued under the provisions of this act, which license has not been cancelled, surrendered or revoked and has not expired.

Pennsylvania Consumer Discount Company Act
7 Purdon's Statutes §6201 et seq.

"Consumer" means the person who is the maker on a note, or the acceptor of a bill of exchange, or the defendant on a judgment, or the mortgagor on a mortgage, or the lessee on a lease, or the bailee on a bailment, or the purchaser on a conditional sales contract, or the person or persons obligated to pay any other negotiable instrument defined as a "contract" under this act.

"Charges" means and includes all interest or discount and the service charge which a licensee is authorized to collect by the provisions of this act.

"Default" means failure to pay a contract when due or failure to pay any stated installment when due. 1937, April 8, P.L. 262, § 2; 1947, June 20, P.L. 665, § 1.

§ 6203. LICENSE REQUIRED

A. On and after the effective date of this act, no person, partnership, association, foreign business corporation organized under or by virtue of any laws other than those of this Commonwealth, nonprofit corporation, common law trust, joint-stock company, or any other group of individuals however organized, shall engage or continue to engage in this Commonwealth, either as principal, employe, agent or broker, in the business of negotiating or making loans or advances of money or credit, in the amount of value of three thousand five hundred dollars ($3,500) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of six per cent (6%) per year on the amount actually loaned or advanced or on the unpaid principal balances when the contract is payable by stated installments:

Pennsylvania Consumer Discount Company Act
7 Purdon's Statutes §6201 et seq.

B. On and after the effective date of this act, no domestic business corporation organized under or existing by virtue of the Business Corporation Law of this Commonwealth, and no director, officer, employe, agent or member of such corporation, shall engage or continue to engage in this Commonwealth, either as principal, employe, agent or broker, in the business of negotiating or making loans or advances of money or credit, in the amount or value of three thousand five hundred dollars ($3,500) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of six per cent (6%) per year on the amount actually loaned or advanced, or on the unpaid principal balances when the contract is payable by stated installments, without first obtaining a license from the Secretary of Banking of the Commonwealth of Pennsylvania in accordance with the provisions of this act. 1937, April 8, P.L. 262, § 3; 1947, June 20, P.L. 665; § 1; 1963, July 30, P.L. 335, § 1.

§ 6204. APPLICATION FOR LICENSE

The application for such license shall be in writing, under oath and in the form prescribed by the Secretary of Banking. The application shall contain the corporate title of the applicant, which shall include the words "Consumer Discount Company"; the street and number, if any, office building and roof number, if any, city, borough, township or municipality, and county where the business is to be conducted; date of incorporation; name and residence address of all directors; and such other information as the Secretary of Banking may require.

Pennsylvania Consumer Discount Company Act
7 Purdon's Statutes §6201 et seq.

A separate application on the prescribed form shall be filed for each place of business conducted by a licensee. 1937, April 8, P.L. 262, § 4.

§ 6205. LICENSE BOND

A bond in the penal sum of five thousand dollars ($5000) shall accompany every application for license. Such bond shall be executed by a surety company authorized by the laws of Pennsylvania to transact business within this Commonwealth. The bond shall be renewed and refiled annually not later than June first for the first three consecutive years from the date on which the licensee was first licensed. The bond shall be executed to the Commonwealth of Pennsylvania and shall be for the use of the Commonwealth and for any person or persons who may have a cause of action against the licensee. The condition of the bond shall be that the licensee will comply with and abide by all the provisions of this act and all the rules and regulations of the Secretary of Banking, lawfully issued in accordance with this act and that the licensee will pay to the Commonwealth to the Secretary of Banking, or to any person or persons, and any and all monies that may come due to the Commonwealth, to the Secretary of Banking, or to any person or persons, from the said licensee under and by virtue of the provisions of this act. If any person shall be aggrieved by the misconduct of a licensee and shall recover judgment against such licensee, such person may, on any execution issued under such judgment, maintain an action upon the bond of the licensee in any court having jurisdiction of the amount claimed, provided the Secretary of Banking assents thereto.

Pennsylvania Consumer Discount Company Act
7 Purdon's Statutes §6201 et seq.

A separate bond shall be provided for each place of business conducted by a licensee. After the licensee has been continuously licensed for three (3) consecutive years, such bond shall not be renewed or refiled unless the Secretary of Banking has reason to believe that such bond is necessary and notifies the licensee in writing on or before May 1 that such bond is required. 1937, April 8, P.L. 262, § 5; 1963, July 30, P.L. 335, § 2.

§ 6206. LICENSE FEE

A license fee of one hundred dollars ($100) shall accompany each application for license under this act. Each license shall remain in full force and effect until surrendered, revoked or suspended as herein provided. The licensee fee of one hundred dollars ($100) shall be paid annually on or before June first. No abatement of the said license fee shall be made if the license is issued for less than one year. An additional license fee of one hundred dollars ($100) shall be paid for each place of business conducted by a licensee.

All license fees and fines received by the Secretary of Banking under this act shall be deposited in the State Treasury to the credit of the Banking Department Fund for the use of the Secretary of Banking in administering this act. 1937, April 8, P.L. 262, § 6; 1963, July 30, P.L. 335, § 2.

§ 6207. ORGANIZATION; MINIMUM CAPITAL

A license under the provisions of this act shall be issued only to a corporation organized under the Business Corporation Law of the Commonwealth of Pennsylvania. Such corporation shall be incorporated with a minimum

capitalization of twenty-five thousand dollars ($25,000). At the time of applying for a license under this act, the minimum subscribed capital shall be twenty-five thousand dollars ($25,000), and the minimum paid in capital shall be ten thousand dollars ($10,000). The minimum subscribed capital of twenty-five thousand dollars ($25,000) shall be fully paid in within one year of the date of issuance of the license. 1937, April 8, P.L. 262, § 7.

§ 6208. Issuance of license

The Secretary of Banking, if he approves the application for license, shall issue to each applicant a certificate showing the name of the corporation and address of the place of business. Such license shall be posted in a conspicuous place in the office of the licensee so that it will be in full view of the public at all times. A license may not be transferred or assigned. A licensee may, with the approval of the Secretary of Banking, change his place of business to another location within the same municipality. A licensee desiring to change his place of business shall give written notice thereof to the Secretary of Banking and return the license certificate to the Secretary of Banking for amendment. The Secretary of Banking, if he approves the removal of the place of business, shall endorse on the license his approval of the change of address and the date thereof, which shall thereafter be the authority for the operation of such business under such license at the new location. No change in the place of business of a licensee to a location outside the original municipality shall be permitted: Provided, however, a licensee may obtain a new license for a place of business in a new location in a municipality other than that in which the original place of business

was located. Only one place of business may be operated under the same license.

A licensee may operate more than one place of business by obtaining a separate license by filing an application for each additional place of business, and by furnishing a bond for each additional place of business and by paying the license fee provided in this act for each additional place of business. 1937, April 8, P.L. 262, §. 8.

§ 6209. Records required

Licensees operating under the provisions of this act shall maintain adequate and complete records of all business transacted, containing such information and in such form as shall be prescribed by the Secretary of Banking by general rule or regulation. The records of licenses shall be maintained in the English language. The records of licensees shall be retained for a period of two years after the date of final payment on any contract. 1937, April 8, P.L. 262, § 9.

§ 6210. Reports to the Secretary of Banking

Licensees operating under the provisions of this act shall annually, on or before the first day of March, file a report with the Secretary of Banking, giving such relevant information concerning the business and operations during the previous calendar year as the Secretary of Banking may require. Such report shall be made under oath and shall be in the form prescribed by the Secretary of Banking. A separate report shall be filed for each place of business maintained by a licensee. The Secretary of Banking may at any time upon thirty (30) days notice require a licensee to file special reports in

addition to the annual report. For failure to file such reports within the time specified, the licensee shall pay to the Secretary of Banking a penalty of ten dollars ($10) for each calendar day which such report is overdue, but the Secretary of Banking may, in his direction, relieve a licensee of any portion or of all such fine. Such fine, which has not been paid by the licensee and for the payment of which the licensee has not been relieved, may be collected by the Secretary of Banking from the bonding company which has executed the bond required under this act, and the Secretary of Banking may maintain an action for the recovery of such fine in any court of competent jurisdiction. 1937, April 8, P.L. 262, § 10.

§ 6211. Examinations by the Secretary of Banking

The Secretary of Banking, and any person designated by him for that purpose, may at any time investigate the business and affairs and examine the books, accounts, papers, records, documents, and files therein of every licensee and of every person who shall be engaged in business contemplated by this act, whether such person shall act or claim to act as principal, agent or broker, or under or without the authority of this act. For this purpose the Secretary of Banking shall have free access to the offices and places of business, books, accounts, papers, records, documents, files, safes and vaults of all such persons. A person, who is not licensed under this act, shall be presumed to be engaged in business contemplated by this act if he advertises or solicits business as principal, agent or brower for which a license is required by the provisions of this act, and the Secretary of Banking, and any person designated by him for that purpose, is in such cases authorized to examine the books, accounts, papers,

records, documents, files, safes and vaults of such persons for the purpose of discovering violations of this act.

The cost of every examination of the business of a licensee by the Secretary of Banking, or his duly authorized representative, shall be paid by the licensee so examined, and the Secretary of Banking may collect such costs from the licensee or from the surety company which has executed the bond required under this act, and he may maintain an action for the recovery of such costs in any court of competent jurisdiction. 1937, April 8, P.L. 262, § 11.

§ 6212. Authority of the Secretary of Banking

The Secretary of Banking shall have the power to reject any application for license if he is satisfied that the financial responsibility, experience, character and general fitness of the person or persons shown on the application for license as officers and directors of the applicant corporation are not such as to command the confidence of the community and to warrant the conclusion that the business will be operated honestly, fairly, and within the intent and purpose of this act and in accordance with the general laws of this Commonwealth: Provided, however, That no license may be issued, if any director, officer, employe, or agent of the applicant corporation has been convicted under this act for engaging in business contemplated by this act without having obtained a license under this act, or if any director, officer, employe, or agent of the applicant corporation was a director, officer, employe, or agent of a corporation which had been convicted of a second offense violation of this act

of Louisiana, 165 U. S. 578; *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357. Compare *Home Ins. Co.* v. *Dick*, 281 U. S. 397. Application of the New Jersey Act to the transaction in question (and all others in the same fact pattern) constitutes just such an unconstitutional extension of jurisdiction over foreign transactions. The plain effect of such application—where the foreign lender is precluded from collecting any part of his loan—is one of deprivation of property without due process of law.

4. The Issues Presented in this Case Will Have Applicability Throughout the United States.

At this writing six other states have enacted statutes comparable to the New Jersey Act: Maryland,[19] New Hampshire,[20] Ohio,[21] Rhode Island,[22], Texas,[23] and West Virginia.[24]

The very issues with which the New Jersey courts have been confronted in this case will undoubtedly arise in these other states, for all of them have penalty provisions which to varying degrees deny the lender what he has bargained for if that bargain was not made in

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[19] "Secondary Mortgage Loan Law", L. 1967, ch. 390, 5 Ann. Code Md., Art. 66, §39 *et seq.*

[20] "Second Mortgage Home Loans", L. 1967, 258:2, 4 N.H.R.S.A. §398A:1 *et seq.*

[21] "Second Mortgage Loans", 13 Page's Ohio R. C. A. §1321.51 *et seq.*

[22] "Secondary Mortgage Loans", P. L. 1966, ch. 269, §21 *et seq.*, 4 G.L.R.I. §19-25.2-1 *et seq.*

[23] "Secondary Mortgage Loans", Act 1967, 60th Leg., p. 656, ch. 274 §2, 15 Vernon's Texas C. S., Art. 5069-5.01 *et seq.*

[24] "Secondary Mortgage Loans", L. 1967, c. 31, 10 W. Va. Code, §31-17-1 *et seq.*

conformance with the law of the borrower's home state. Interestingly enough, none of the six states expressly provides that an action may not be brought in its courts for the enforcement of a loan not made in accordance with the provisions of its regulatory statute. Two of them, however, have equivalent forfeiture provisions: Rhode Island has declared that a loan shall be *void* if the lender takes any action in the making or collecting of the loan which is in violation of any provision of the act;[25] West Virginia has pronounced that a loan shall be *void* for any violation of its statute.[26] In Maryland, a violating lender can collect the principal amount of his loan only; and if the violation is "knowing", the lender must pay triple the amount of interest and other charges made which exceed those permitted by law.[27] In New Hampshire, the maker of an "illegal loan" can recover only the principal amount.[28] In Ohio, the violating lender forfeits twice the non-principal contracted for.[29] In Texas, the non-complying lender forfeits twice the interest and other charges obtained from the borrower, plus reasonable attorneys' fees; if the interest and other charges were twice the permitted amount, the lender forfeits all principal as well.[30]

The warning of Chief Justice Weintraub, that the New Jersey Supreme Court's interpretation and application of the New Jersey Act is "at war with the considerations of comity which attend choice of law" (App. 11a-12a)—a declaration of constitutional problems in non-constitu-

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[25] 4 G.L.R.I. §19-25.2-19.

[26] 10 W. Va. Code, §31-17-17.

[27] 5 Ann. Code Md., Art. 66, §69.

[28] 4 N.H.R.S.A. §398A:7.

[29] 13 Page's Ohio R. C. A. §1321.56.

[30] 15 Vernon's Texas C. S., Art. 5069-8.01.

tional language—clearly has repercussions far beyond the borders of the Delaware River. The problems of Oxford and of the Commonwealth of Pennsylvania will plainly be mirrored throughout the states bordering those jurisdictions which have enacted secondary mortgage loan laws. Indeed, approval of the constitutionality of the New Jersey courts' views by this Court will clearly give reason for the judiciaries of all states—including those which have *not* enacted secondary mortgage loan laws—to deny out-of-state lenders access to their courts on the ground that enforcement of such loans involving interest in excess of that permitted by local law is contrary to the forum state's public policy.

5. Conclusion.

For all of the reasons cited above, we believe that the questions presented by this appeal are substantial and of significant public importance. We therefore respectfully request that this Court note probable jurisdiction, so that these constitutional matters may be fully briefed and heard on oral argument.

Respectfully submitted,

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